84-1930

Office - Supreme Court, U.S.
FILED
JUN 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MONTANA,

Petitioner,

v.

DONALD P. HODEL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 449-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. In the Surface Mining Control and Reclamation Act, Congress established an abandoned mine reclamation fund consisting of fees collected from current mining operations and directed in Section 1232(g)(2) of the Act that 50 percent of the fees collected in an Indian reservation be allocated to that reservation and that 50 percent of the fees collected in the State be allocated to the State for the purpose of reclaiming the land. The first question presented here is whether a regulation promulgated by the respondents conflicts with Section 1232(g)(2) because it allocates to Indian tribes fees collected *outside* reservation boundaries and thereby places the tribe in charge of conducting reclamation activities, including the construction of public facilities, in non-reservation areas populated by non-Indians over which the tribe has no jurisdiction or responsibility.

2. The second question presented is whether the decision of the court of appeals upholding a regulation that interprets the statutory language "Indian reservation" to mean off-reservation mineral rights conflicts with *Escondido Mutual Water Co. v. LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians*, 104 S.Ct. 2105 (1984), which held that the statutory language "Indian reservation" could not be construed to include off-reservation water rights.

PARTIES TO THE PROCEEDING

The parties here are the State of Montana; Donald P. Hodel, Secretary of the Interior; Jed D. Christensen, Acting Director of the Office of Surface Mining Reclamation and Enforcement, Department of Interior; The Department of the Interior; and the Crow Tribe of Indians.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATION INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 13, 14

Ash Sheep Co. v. United States, 252 U.S. 159 (1920) .. 6

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778 (1984) 11, 12

Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981) 6

Escondido Mutual Water Co. v. LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians, 104 S.Ct. 2105 (1984) ..... i, 9, 10, 11

Little Light v. Crist, 649 F.2d 683 (9th Cir. 1981) 6

Solem v. Bartlett, 104 S.Ct. 1161 (1984) 10, 13

STATUTES AND REGULATIONS:

16 U.S.C. § 797(e) 10

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

30 U.S.C. § 1231 ..... 4, 8

30 U.S.C. § 1232 ..... 2, 4, 7, 8, 9, 10, 11, 12, 13

30 U.S.C. § 1233 8

30 U.S.C. § 1235(a) 11

30 U.S.C. § 1235(c) 12

30 U.S.C. § 1273(a) 13

30 U.S.C. § 1276(a)(1) 6, 14

30 U.S.C. § 1291(9) 5, 9

30 U.S.C. § 1291(25) 12

30 U.S.C. § 1300(h) 13

33 U.S.C. § 357 6

Act of April 11, 1882, ch. 74, 22 Stat. 42 6

Act of July 10, 1882, ch. 284, 22 Stat. 157 6

Indian Appropriations act of March 3, 1891, ch. 543, 26 Stat. 989 6

Act of April 27, 1904, ch. 1624, 33 Stat. 352 6

30 C.F.R. § 872.11(b)(3) 3, 4, 5, 6, 7, 9

Table of Authorities Continued

	Page
43 Fed. Reg. 49932	5
46 Fed. Reg. 60782	5, 6
47 Fed. Reg. 28574	4
47 Fed. Reg. 28580	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

STATE OF MONTANA,

Petitioner,

v.

DONALD P. HODEL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 749 F.2d 740. On February 6, 1985, the panel issued an order amending its opinion (App. 38a, *infra*). The opinion of the district court (App. 28a, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1984 (App. 43a, *infra*). On February 11, 1985, the court denied a timely petition for rehearing (App. 40a-42a, *infra*). On May 6, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the district court rested on 30 U.S.C. § 1276(a)(1) and 28 U.S.C. § 1331.

STATUTES AND REGULATION INVOLVED

1. Section 1232 of Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1232), provides in relevant part:

> § 1232. Reclamation fee
>
> (a) Payment; rate
>
> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.
>
> . . .
>
> (g) Allocation of funds
>
> (1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.
>
> (2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. Where the Governor of a State or the head of a governing body of a tribe certifies that (i) objectives of the fund set forth in sections 1233 and 1239 of this title have been achieved, (ii) there is a need for construction of specific public facilities

> in communities impacted by coal development, (iii) impact funds which may be available under provisions of the Federal Mineral Leasing Act of 1920, as amended [30 U.S.C.A. § 181 et seq.], or the Act of October 20, 1976, Public Law 94-565 (90 Stat. 2662) [31 U.S.C.A. § 1601 et seq.], are inadequate for such construction, and (iv) the Secretary concurs in such certification, then the Secretary may continue to allocate all or part of the 50 per centum share to that State or tribe for such construction: *Provided, however,* That if funds under this subparagraph (2) have not been expended within three years after their allocation they shall be available for expenditure in any eligible area as determined by the Secretary.
>
> (3) The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this subchapter. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 1235 of this title when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States those projects funded directly or in conjunction with other Federal agencies.

2. Section 872.11(b)(3) of the regulations promulgated under Subchapter IV of the Surface Mining Control and Reclamation Act (30 C.F.R. § 872.11(b)(3)), provides in relevant part:

> An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. . . .

STATEMENT

This case arises under Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.

§ § 1231-1243). While other portions of the Act are concerned with the regulation of current mining activities, Subchapter IV is directed to repairing the damage done to the land by mining conducted prior to August 3, 1977, when the Act became effective.

In order to alleviate such pre-1977 environmental damage, Subchapter IV created on the books of the Department of the Treasury a trust fund entitled the Abandoned Mine Reclamation Fund to be administered by the Secretary of the Interior. 30 U.S.C. § 1231. The Fund consists primarily of reclamation fees paid by current coal mine operators on each ton of coal produced after the Act's effective date. 30 U.S.C. § § 1231-1232. In a provision critical to this case, Section 1232(g)(2) of Subchapter IV divides these fees as follows: "Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter." 30 U.S.C. § 1232(g)(2).

Expenditures from the fund are to be used for, among other purposes, "the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by prior coal mining practices." 30 U.S.C. § 1233(5). The geographical allocation of expenditures must reflect both the area from which the fees are collected and national needs. 30 U.S.C. § 1232(g)(1).

On June 30, 1982, the Department of the Interior promulgated final regulations purportedly implementing Subchapter IV's Abandoned Mine Reclamation Program. 47 Fed. Reg. 28574. Section 872.11(b)(3) of the regulations is the regulatory counterpart of Section 1232(g)(2) of Subchapter IV of the Act, which allocated money from the Abandoned Mine Reclamation Fund to States and Indian reservations on the basis of where the money is collected. This regulation altered the statutory language by allocating funds derived from "Indian lands" to the "Indian tribe" rather than allocating funds collected in an

"Indian reservation" to that reservation, as the statute provided. Because the phrase "Indian lands" is viewed by the federal respondents to include areas outside an Indian reservation's boundaries where the Tribe's only claim is to mineral interests (30 U.S.C. § 1291(9)), the regulation had the effect of depriving States of reclamation funds collected on such off-reservation lands.[1]

During the rulemaking proceeding, the States of Montana and New Mexico had submitted comments on Section 872.11(b)(3) protesting this proposed amendment of the statutory language. Although the Department of the Interior evaluated and considered the States' comments, it decided to retain the language of the proposed regulation. 47 Fed. Reg. 28580.[2] According to the explanation accompanying proposed Section 872.11(b)(3), the "Indian reservation" language of the statute should not be used to implement the Act although the term "Reservation" is "defined by law while a definition of 'Indian lands' is not available." 46 Fed. Reg. 60782. The federal respondents further "explained" that under the regulation reclamation fees collected outside an Indian reservation, but arguably on "Indian lands," would remain in a state of limbo "[u]ntil this definition problem is resolved." 46 Fed. Reg. 60782.[3]

---

[1]As promulgated on June 30, 1982, the final regulation tracked the language of a previous regulation issued by the Department of the Interior in 1978, which had not been subjected to judicial review. *See* 43 Fed. Reg. 49932 (Oct. 25, 1978).

[2]On behalf of the State of Montana, Governor Schwinden commented on Section 872.11(b)(3), pointing out that the proposed regulation was much broader than the allocation provision in the statute, which is restricted to "Indian reservation," and that the proposed regulation would cost the State of Montana millions of dollars in lost "reclamation funds which could be used reclaiming hazardous abandoned mine lands." Admin. R. 117-118.

On similar grounds, New mexico also protested the alteration of the statute embodied in the proposed regulation *Id.* at 115-116.

[3]As originally drafted, the regulation used the statutory language and provided, as does Section 1232(g)(2) of the Act, that fifty percent of the funds collected in an "Indian reservation" would be allocated to that "Indian reser-

The impact of the regulation fell on the State of Montana, where there are more than 1 million acres known as the "ceded strip." Coal mining is being conducted on the ceded strip and reclamation fees are being collected there. The ceded strip is not within an "Indian reservation"[4] and the surface area is populated by non-Indian citizens of the State. Within the ceded strip, the Crow Tribe claims beneficial ownership of subsurface coal deposits.[5] The regulation's amendment of the statute thus effectively deprived the State of Montana of the more than $700,000 in reclamation fees collected yearly in the ceded strip, even though such reclamation fees are not collected in any "Indian reservation" as the statute requires before the tribe may receive such fees.

On August 27, 1982, the State of Montana filed an action for judicial review in district court under Section 1276(a)(1) of the Act, challenging Section 872.11(b)(3) of the regulations as arbitrary, capricious and unlawful. On December 22, 1982, the

---

reservation." 46 Fed. Reg. 60782 (December 11, 1981). When the rulemaking proceeding was begun in December 1981, the federal defendants stated that the "preproposed" Section 872.11(b)(3) had been "in error" in using Congress' language "Indian reservation" and that this supposed error had been corrected by substituting "Indian lands" in the proposed regulation. 46 Fed. Reg. 60782 (December 11, 1981).

[4]*See Little Light v. Crist*, 649 F.2d 683, 685 (9th Cir. 1981); and *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981).

[5]The Crow Reservation was first established by the Treaty of Fort Laramie of 1851 (11 Stat. 749) and later reduced in size by a second treaty, the Treaty of Fort Laramie of 1868 (15 Stat. 649) and by later statutes. Act of April 11, 1882, ch. 74, 22 Stat. 42; Act of July 10, 1882, ch. 284, 22 Stat. 157; Indian Appropriations Act of March 3, 1891, ch. 543, 26 Stat. 989, 1039; Act of April 27, 1904, ch. 1624, 33 Stat. 352. In the last of these statutes, the Crow Tribe ceded an area of approximately 1,137,500 acres, now called the "ceded strip," to the United States. Under the 1904 Act, the federal government held the land in trust for the Tribe for entry by non-Indians and the Tribe received the proceeds from disposition of the land. *See* 33 U.S.C. § 357; *Ash Sheep Co. v. United States*, 252 U.S. 159, 163-166 (1920). The area was largely settled by non-Indians and, as the federal respondents admitted in the courts below, most of the surface area of the "ceded strip" is now owned in fee by non-Indians.

district court granted the motion of the Crow Tribe of Indians to intervene as a defendant. The parties then filed cross motions for summary judgment.

On June 30, 1983, without hearing oral argument, the district court issued a written opinion granting the defendants' motions for summary judgment and dismissing the State's suit. App. 28a, *infra*. The court held that although there were persuasive arguments in favor of the State's position regarding the invalidity of the regulation, the court should defer to the agency and uphold Section 872.11(b)(3). App. 35a, *infra*.

The court of appeals upheld the regulation in an opinion by Judge Wright. Without saying whether the regulation accurately interpreted "Indian reservation" in Section 1232(g)(3) to mean non-reservation, and without addressing the federal respondents' explanation for altering the statutory language, the panel held that because the regulation was "reasonable," it was valid. In order to furnish some basis for the regulation, Judge Wright engaged in a lengthy discussion of provisions in the Act other than those in Subchapter IV and Section 1232(g)(2). App. 15a-19a, *infra*.

In the original opinion, the decision to "defer" in favor of the regulation apparently rested on the court's conclusion that States were barred from engaging in reclamation activities on "Indian lands," both on reservation and off. App. 16a, *infra*.On rehearing, after the State pointed out that the opinion had incorrectly relied upon provisions of the Act concerning *current* mining operations and reclamation as distinguished from reclamation of *abandoned* mines, and had distorted a statutory provision by deleting critical language, the panel issued an order revising its opinion but adhering to its decision sustaining the regulation. App. 39a, *infra*.

REASONS FOR GRANTING THE WRIT

This is a case of profound importance to the State of Montana. A vast area of the State populated by non-Indians and outside the boundaries of any Indian reservation is affected.

The decision of the court of appeals deprives the State of millions of dollars in abandoned mine reclamation fees collected in this area and of jurisdiction to conduct a reclamation program for the area pursuant to Subchapter IV of the Surface Mining Control and Reclamation Act of 1977. The court of appeals reached this result by sustaining a regulation that revised the statutory language "Indian reservation" to mean "non-reservation" and to include areas outside reservation boundaries where the tribe claims only subsurface mineral rights. In upholding this regulation, which is contrary to the clear command of the statute, the court below placed itself in conflict with a recent decision of this Court interpreting identical statutory language, contradicted settled principles of statutory construction and administrative law and then sought to justify its result on grounds never considered by the agency that promulgated the regulation.

Congress passed Subchapter IV of the Act in order to correct environmental damage to land and water caused by coal mining activities prior to 1977. Subchapter IV established the Abandoned Mine Reclamation Fund, which the Secretary of the Interior administers. The fund is financed through fees paid by coal mine operators on coal produced by surface and underground mining. 30 U.S.C. § § 1231, 1232(a). Moneys from the fund are to be used to support federal, state and Indian reclamation projects designed to restore the environment previously damaged by coal mining practices and to enhance utilities, roads, recreation and conservation facilities adversely affected by coal mining activities. 30 U.S.C. § 1233. With respect to how the money from the fund is to be apportioned, Congress provided that the "geographic allocation of expenditures for the fund shall reflect both the area from which the revenue was derived" and national needs. 30 U.S.C. § 1232(g)(1).

In addition to these general instructions, Congress specifically directed how fees are to be allocated between States and Indian reservations. The provision critical to this case, Section 1232(g)(2), provides in relevant part that (30 U.S.C. § 1232(g)(2)) (emphasis added):

> Fifty per centum of the funds collected annually in any state or *Indian reservation* shall be allocated to that State or *Indian reservation* by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. . . .

The regulation at issue here—Section 872.11(b)(3)—drastically altered this statutory allocation by deleting the references to "Indian reservation," and providing instead that (30 C.F.R. § 872.11(b)(3)) (emphasis added):

> An amount equal to 50 percent of the reclamation fees collected from *Indian lands* shall be allocated to the *Indian tribe* having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. . . .

The language change from the statute to the regulation is highly significant for the State of Montana. The federal respondents define "Indian lands" to include not only lands "within the exterior boundaries of any Federal Indian reservation" but also any areas where there are "mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9). As so viewed, the phrase "Indian lands" contained in Section 872.11(b)(3) of the regulations means something far different than the phrase "Indian reservation" contained in Section 1232(g)(2), its statutory counterpart. Under the regulation, therefore, abandoned mine reclamation fees collected in the "ceded strip"[6] would go to the Crow Tribe even though the area is not part of the Reservation, even though the area involved is populated by non-Indians and even though Congress specifically decided that only moneys collected from coal mining *in a reservation* should be allocated to that Indian reservation under Section 1232(g)(2) of the Act.

Escondido Mutual Water Co. v. LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians, 104 S.Ct. 2105 (1984), presented a quite similar issue involving the inter-

---

[6]See p.6 *supra*.

pretation of identical language. In *Escondido* the lower court had viewed the phrase "within any [Indian] reservation" in Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) as ambiguous because it did not include tribal water rights outside a reservation. 104 S.Ct. at 2114. This Court disagreed. The Court held that statutory language was "plain." 104 S.Ct. at 2115. The phrase "within any [Indian] reservation" painted a clear geographical picture. *Ibid.* Indeed, the notion that there was some need for altering the statutory language was "quite untenable." *Ibid.* The lower court's refusal to accept the "literal" meaning of the statutory phrase "Indian reservation" was, as the Court held, nothing less than an "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists. . . ." 104 S.Ct. at 2115.

There is no functional difference between *Escondido* and this case. There the statutory language "Indian reservation" was misconstrued to include off-reservation water rights; here, it has been misconstrued to include off-reservation mineral rights. In *Escondido*, the Court rejected this attempted distortion of such "plain" language. The court of appeals had a duty to follow the same course here. Instead of doing so, the court below deemed *Escondido* "irrelevant," stating that there was no evidence Congress had relied on the Federal Power Act in passing Section 1232(g)(2). App. 15a n. 12, *infra*. But that was not the proper inquiry. The question was whether "Indian reservation" in Section 1232(g)(2) meant something far different than it ordinarily means[7]—namely, "non-reservation" mineral rights. The court below, despite its lengthy discourse on the Act, offers nothing to indicate that Congress could possibly have intended such a departure from common usage. *Escondido* thus stands firmly against the panel's decision.

What is remarkable here is that the federal respondents admitted that the language Congress chose in Section 1232(g)(2)—"Indian reservation"—was clear and unam-

---

[7]This Court, for exampie, has made clear that its decisions "have established a fairly clean analytical structure" for determining the extent of an "Indian reservation." *Solem v. Bartlett*, 104 S.Ct. 1161, 1166 (1984).

biguous. Indeed, the federal respondents revised the statute because the statutory language was so plain. In a passage the court below did not address, respondents explained that the regulation deleted the statutory language despite the fact that the term "Reservation" is "defined by law while a definition of 'Indian lands' is not available" and that this alteration of the statutory language created a "definition problem." 46 Fed. Reg. 60782 (1981). Respondents thus conceded that their purpose was, as the Court stated in *Escondido*, "to circumvent the plain meaning of the statute by creating an ambiguity where none exists. . . ." 104 S.Ct. at 2115.

The court of appeals did not determine whether respondents' rewriting of "Indian reservation" to mean "non-reservation Indian lands" (App. 26a *infra*) accurately interpreted the statutory language. Instead, the court relied on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984), and pronounced respondents' regulation "reasonable" (App. 26a *infra*). But in doing so, the court misread *Chevron*, which requires first that a reviewing court determine "whether Congress has directly spoken to the precise question at issue." 104 S.Ct. at 2781. If the court below had undertaken this inquiry, as *Chevron* requires, it would have answered in the affirmative and, as *Chevron* further holds, struck down the regulation.

The precise question involved—how abandoned mine reclamation fees should be allocated—is not one on which "the statute is silent or ambiguous" (*id.* at 2782). Congress addressed the question directly: Section 1232(g)(2) provides in the clearest possible terms that only fees collected *within* an Indian reservation are to be allocated to that reservation. Under *Chevron*, the court of appeals therefore had no occasion to consider the "reasonableness" of respondent's regulation.[8]

[8]Congress left no statutory "gap" for the agency to fill (compare *Chevron*, 104 S.Ct. at 2782). Far from making a "legislative delegation" to the federal respondents, Congress required the Secretary to promulgate regulations under Subchapter IV "incorporating the provisions of this subchapter" (30 U.S.C. § 1235(a)). Section 872.11(b)(3) of the regulations violates this rather unusual provision because, instead of "incorporating" the language of Section 1232(g)(2) in the regulation, the regulation deletes the statutory language.

Regardless whether the allocation of fees provided in the regulation was "reasonable," Congress decided on a different allocation.

Moreover, as we have discussed, respondents admitted that the statutory phrase "Indian reservation" was not ambiguous and revised the statutory language in order to create an ambiguity. The court of appeals' lengthy consideration of other provisions of the Act—provisions that deal with current mining operations and reclamation as distinguished from abandoned mine reclamation relating to pre-1977 mining operations[9]—is beside the point. Unlike *Chevron*, this case is not one in which "the agency considered the matter in a detailed and reasoned fashion" and weighed conflicting policies (104 S.Ct. at 2793).[10]

The regulation and the decision of the court of appeals upholding it ultimately defy common sense and contradict the policy recognized by this Court in *Solem v. Bartlett*, 104 S.Ct. 1161, 1167 n. 12 (1984), that "[w]hen an area is predominately

---

[9]In its initial opinion, the court stated that the "Act unambiguously denies the state the power to administer funds on any Indian lands, on or off the reservation." App. 16a, *infra*. In support, the court misquoted a provision of the Act (30 U.S.C. § 1291(25)) that dealt *not* with Subchapter IV's *abandoned* mine reclamation, but with Subchapter V and reclamation with respect to current mining. When Montana pointed out the court's error on rehearing, the court revised its opinion (App. 38a-40a, *infra*) but sought to justify its conclusion by adding a lengthy footnote to the opinion (App. 39a-40a, *infra*).

The convoluted explanation in the court's footnote, however, only compounds the initial error in its opinion. The court correctly notes that before a State may receive its 50 percent share from the Fund, it must have an approved program to regulate current mining and reclamation (*ibid.*). But the court then concludes—without any basis whatsoever—that the approved State program regarding current mining *must* cover "the region in question"—here the ceded strip (*ibid.*). The Act, however, merely requires that a State regulatory program for current mining be in place so as to demonstrate the State's capability for conducting reclamation of abandoned mines, not that it cover a particular area. See 30 U.S.C. § 1235(c).

[10]Indeed the court of appeals never alludes to the agency's stated basis for promulgating the regulation.

populated by non-Indians" it is a serious burden on State government to hold that it is under tribal control. Here, Subchapter IV provides that expenditures from the fund should reflect the geographical area where the fees are collected. The fees allocated under fifty percent formula therefore may be used to construct "public facilities . . . in communities impacted by coal development." 30 U.S.C. § 1232(g)(2). Within a reservation, those "communities" presumably would consist of Indians. However, on "Indian lands" outside a reservation, such as the "ceded strip," where the tribe's only interest is in mineral rights, the "community" consists of non-Indians. Once the minerals are sold, the tribe has no further interest in the area.

In such off-reservation areas, Section 1232(g) of the Act by its terms allocates the funds for the construction of public facilities to the proper body—the State. In changing "Indian reservation" to "Indian lands," however, the regulation altered this statutory scheme by allocating the fees derived from such off-reservation areas to the Indian tribe holding the mineral interests, thereby putting an Indian tribe in charge of deciding whether and what public facilities are needed for non-Indian communities on non-reservation land and of constructing public facilities for non-Indians. The court below never explained how Congress could possibly have intended such an inscrutable result.[11] See *American Tobacco Co. v. Patterson*, 456 U.S. 63,

---

[11]Indeed, Congress was not even sure that Indian tribes had limited jurisdiction to regulate their own *current* mining activities in such off-reservation areas where they held only mineral rights. Because of its uncertainty, Congress required in Section 1300 that the Secretary of the Interior "analyze and make recommendations regarding the jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations" (30 U.S.C. § 1300(h)). Congress further directed "That except as provided in section 1300 of this title the provisions of this chapter [Chapter 25—Surface Mining Control and Reclamation] *shall not be applicable to Indian lands.*" 30 U.S.C. § 1273(a) (emphasis added). The regulation at issue thus *directly contradicts* not only Section 1232(g)(2), but also this provision by making the allocation of reclamation funds turn on whether mining occurs on "Indian lands" rather than Indian reservations as Congress provided.

71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

Only review by this Court can correct the error of the court below. A conflict in the courts of appeals cannot arise in light the jurisdictional statute (30 U.S.C. § 1276(a)(1)). Unless this Court acts, the "ceded strip" will remain a regulatory no-man's land regarding reclamation of abandoned mines and, contrary to Congress' directive, the millions of dollars collected there will not be allocated to the State in order to further the statutory purposes of the abandoned mine reclamation program.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 449-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

Date: June 11, 1985.

APPENDIX

APPENDIX

ITEM	Page
1. Court of Appeals Opinion, November 20, 1984	1a
2. District Court Opinion; June 30, 1985	28a
3. Court of Appeals Order Amending Opinion, February 6, 1985	37a
4. Court of Appeals Orders Denying Montana's Petition for Rehearing and Suggestion for Rehearing *Banc*, February 11, 1985	41a
5. Court of Appeals Judgment, November 20, 1984 ...	44a

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1982

STATE OF MONTANA, APPELLANT

v.

WILLIAM P. CLARK, Secretary of the Department of the Interior, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 82-02421)

Argued September 25, 1984

Decided November 20, 1984

A. Raymond Randolph, with whom *Christopher L. Varner* was on the brief, for appellant.

Edward J. Shawaker, Attorney, Department of Justice, with whom *Robert C. Klarquist*, Attorney, Department of Justice, was on the brief, for federal appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Dale T. White, with whom *Robert S. Pelcyger* was on the brief, for appellee Crow Tribe of Indians. *Martin E. Seneca, Jr.* entered an appearance for the Crow Tribe of Indians.

Before WRIGHT and WALD, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: The State of Montana appeals a District Court order upholding an Interior Department regulation, 30 C.F.R. § 872.11(b)(3) (1983), against a challenge that it is inconsistent with the organic statute, the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (1982). The Crow Tribe of Indians joins the federal government in defending the validity of the regulation. In addition to this substantive issue, the case presents the threshold procedural question whether Montana's petition for judicial review of the regulation was timely. We hold that Montana's petition for review satisfied the Act's 60-day filing requirement, *id.* § 1276(1), and is properly before this court. On the merits, we agree with the District Court and find the challenged regulation a reasonable construction of the Act.

I. BACKGROUND

A. *General Provisions of the Act*

As its title indicates, the Surface Mining Control and Reclamation Act is designed to meet two related concerns. First, Congress wished to regulate current and future strip mining operations to "protect society and the environment from the adverse effect of surface coal mining operations." 30 U.S.C. § 1202(a). Toward this end, Subchapter V, *id.* §§ 1251-1279, requires the Office of Surface Mining (OSM) to promulgate interim federal standards and provides that a state may take over the

regulatory process by submitting a program that meets the approval of the Secretary of the Interior. *See generally In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1350-1352 (D.C. Cir. 1980). Second, Congress sought to provide for reclamation of land and water resources in mining areas abandoned prior to the Act's enactment on August 3, 1977. *Id.* § 1202(h). Subchapter IV, *id.* §§ 1231-1243, sets up a reclamation fund to be held in trust by the Secretary of the Interior. *Id.* § 1231 (a). Fees exacted from current operators of strip mining projects are pooled into the trust, which the Secretary is to distribute to any state or Indian tribe that has submitted an approved "abandoned mine reclamation program." *Id.* §§ 1232(a) & 1235(k). Upon approval of such a program OSM must allocate funds to the state or tribe in a manner that "reflect[s] both the area from which the revenue was derived as well as the national program needs for the funds." *Id.* § 1232(g)(1). In particular, Section 1232(g)(2) states that 50 percent of the funds "collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation."

Nominally, at least, the Act draws a distinction between the role given to Indian tribes in the *regulation* of current mining operations and that allotted to them in the *reclamation* of abandoned mines. Subchapter V gives Indians no direct role in regulating current or prospective mining operations on Indian lands. Believing the jurisdictional status of those areas too unclear to permit effective allocation of the regulatory function, Congress directed the Secretary to submit a report within six months of the enactment of the Act on August 3, 1977 and propose "legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." *Id.* § 1300(a)-(h).[1]

---

[1] OSM commissioned a lengthy study on the subject of surface mining on Indian lands. COUNCIL OF ENERGY RESOURCE

See H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975). In the interim Congress decided to protect Indian lands from the potential ravages of surface mining through federal performance standards rather than state oversight. *Id.*

Indians are, however, given some role in reclamation of abandoned mines on Indian territory. In the final conference session, and virtually without discussion, House and Senate conferees added Section 1235(k), which reads: "Indian tribes having within their jurisdiction eligible lands [as defined in § 1234] * * * shall be considered a 'State' for the purposes of [Subchapter IV]." *See* H.R. Rep. 95-493, 95th Cong., 1st Sess. 99 (1977). Thus Indian tribes, though denied any participation in the *regulation* of current mining operations, may submit *reclamation* plans and, if approved by the Secretary, administer the funds earmarked for this purpose. Under current OSM policy, however, the practical import of permitting tribes to submit reclamation plans is minimal. Reading the Act to prohibit assignment of reclamation authority to an entity statutorily incapable of exercising full regulatory authority, the Secretary will not approve reclamation plans submitted by a tribe until Congress has clarified the status of Indian lands under the Act. *See* Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment at 13-14, *reproduced in* Appendix (App.) at 119-120; 47 Fed.

TRIBES, THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS (1979). It was completed in 1979 and, presumably, submitted to the Congress in accord with 30 U.S.C. § 1300(a). Over seven years have now passed since the Act was signed into law, and Congress has yet to enact the promised legislation clarifying the administrative status of Indian lands. In the 98th Congress the Senate Committee on Indian Affairs held hearings on S. 2879, a bill that would directly address the current controversy. But the bill had not been reported out of committee by the time the Congress adjourned *sine die* on October 12, 1984.

Reg. 28580 (1982).[2] Approval by the Secretary is a prerequisite to any distribution of funds. 30 U.S.C. § 1235.

B. *The Present Controversy*

This case requires us to review an OSM regulation promulgated to implement Section 1232(g)(2), the provision of Subchapter IV that sets out the allocation formula for distribution of the Abandoned Mine Reclamation Fund to eligible parties. That section mandates that 50 percent of the funds collected "in any State or *Indian reservation* shall be allocated to that State or *Indian reservation*" pursuant to an approved reclamation program. (Emphasis added.) The Act does not define "Indian reservation." It does, however, define "*Indian lands*" as "all lands * * * within the exterior boundaries of any Federal Indian reservation * * * and all lands including mineral interests held in trust for or supervised by an Indian tribe." Section 1291(9).

In order to implement Section 1232(g)(2), in 1978 the Interior Department issued 30 C.F.R. § 872.11(b)(3) after notice and comment. The regulation, which was reenacted in identical form in 1982, largely tracked the language of Section 1232(g) but substituted "Indian lands" for "Indian reservation."[3] Thus under the regu-

---

[2] The Secretary's approach apparently stems from an interpretation of 30 U.S.C. § 1235(b) & (h). As discussed in text *infra*, the relationships among §§ 1235(b), (h) & (k), 1273(a), and 1300(a) are extremely obscure. The parties do not raise and we do not reach the question whether the policy of postponing distribution of funds collected on non-reservation Indian lands is consistent with or required by the Act. We note, however, that in upholding 30 C.F.R. § 872.11(b)(3) we have examined that regulation in light of OSM's policy to suspend distribution pending congressional clarification.

[3] 30 C.F.R. § 872.11(b)(3) reads in pertinent part:

> An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian

lation fees collected from mines beneficially owned by or for Indians, but outside their reservation, would go to the tribe rather than to the state, provided the Secretary approves its reclamation plan. The State of Montana challenges the regulation as "not in accordance with law." 5 U.S.C. § 706(2)(a) (1982). The Secretary of the Interior and the Crow Tribe of Indians maintain that the regulation is a reasonable construction of the Act.

At stake in the case is the right to administer approximately $700,000 [4] a year collected from surface mining operations in a 1.13-million-acre tract in Montana known as the "ceded strip." Under a 1904 treaty the Crow Tribe ceded the strip to the United States, but retained a beneficial interest in the substantial coal deposits in the area. *See* 33 U.S.C. § 357 (1982). Thus, though not within the "exterior boundaries of any Federal Indian reservation," 30 U.S.C. § 1291(9), all parties agree that the ceded strip qualifies as "Indian land" as defined by the statute.[5] *Id.* Accordingly, substitution of the phrase

---

tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. * * *

[4] Brief for appellee Crow Tribe of Indians at 36 nn.13-14, *citing* Keystone Coal Industry Manual, G. Nielson ed., McGraw Hill, N.Y., N.Y., 1978 Annual Volume at 966-967; 1979 Volume at 998-999; 1980 Volume at 903-904; 181 Volume at 1076-1078; 1982 Volume at 1126-1128. During each of the years since 1978 the State of Montana has received approximately $5,000,000 in reclamation funds. *Id.*

[5] The Crow Tribe also argues that the ceded strip is a "reservation" within the meaning of the Act. *Cf. Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1982) (ceded strip not considered part of reservation for purposes of criminal jurisdiction); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981) (discussing possible limitations on state's power to tax proceeds from coal mined on ceded strip), *cert. denied*, 459 U.S. 916 (1982). Given our resolution of the statutory question, we need not decide whether the ceded strip qualifies as a reservation under 30 U.S.C. § 1232(g)(2).

"Indian lands" for the statutory language "Indian reservation" has the effect of authorizing the Crow Tribe, rather than the State of Montana, to apply for the funds collected on the ceded strip. We note again that, although the challenged regulation has the effect of depriving Montana of funds derived from the ceded strip, it does *not* actually authorize any distribution to the Crow Tribe. Instead, under OSM's current interpretation of the statute, monies collected from the ceded strip are held in escrow pending congressional clarification of regulatory jurisdiction over Indian lands.[6]

II. The Timeliness of the Petition for Judicial Review

If, as the federal appellees argue and the District Court found, Montana's petition for review was not timely, we need not face the statutory question at all. We conclude, however, that the Act's 60-day period for judicial review ran from June 30, 1982, the date of the challenged regulation's republication, and not from October 25, 1978, the date of its original promulgation. Under controlling principles of administrative law, Montana's petition for judicial review, filed 58 days after the regulation's reissuance, was properly before the District Court.

Section 1276(a)(1) of the Act requires that petitions for review of regulations promulgated by the Secretary of the Interior be filed within 60 days of issuance of the regulations. The Secretary initially issued the challenged regulation on October 25, 1978. 43 Fed. Reg. 49940, 30 C.F.R. Part 872. Montana does not dispute that, although it had notice of the regulation and full opportunity to challenge it at that time, it elected not to do so. On De-

---

[6] At the end of three years any funds not distributed pursuant to 30 U.S.C. § 1232(g)(2) "shall be available for expenditure in any eligible area as determined by the Secretary." *Id.*

cember 11, 1981 OSM published "proposed rules" in the Federal Register and solicited comments from the public. 46 Fed. Reg. 60778. One of those rules, the regulation at issue in this case, was identical to that published in 1978. *Id.* at 60781. Apparently, the Secretary's primary motivation for initiating rulemaking procedures was to determine whether the OSM regulations complied with Executive Order 12291, which mandates a weighing of the costs and benefits of agency regulations. 47 Fed. Reg. 28574 (1982).

But in "seeking early and meaningful public participation," the Secretary did not limit comments to consideration of the burdensomeness of the regulations. 46 Fed. Reg. 60779 (1981). Indeed, with reference to 872.11(b)(3) he took the opportunity expressly to explain the substitution of "Indian lands" for the statutory language "Indian reservation." *Id.* at 60782. Two states, Montana and New Mexico, submitted comments objecting to 872.11(b)(3). On June 30, 1982 the agency announced final rules designed to "clarify the relationships and responsibilities of the States, Indian tribes, and Federal Government in implementing" the surface mining regulatory program. 47 Fed. Reg. 28574 (1982). The agency expressly considered, responded to, and rejected Montana's comments. *Id.* at 28580, 28592. Fifty-eight days later Montana filed this petition for judicial review of the final rules.

The law in this circuit is clear that an agency decision not to amend longstanding rules after a notice and comment period is reviewable agency action.[7] *See, e.g., Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983). Although acknowledging the general reviewability of a decision not to amend, the District Court believed that *Natural Re-*

[7] The Administrative Procedure Act, 5 U.S.C. § 551(5) (1982), defines "rule making" as the "agency process for formulating, *amending*, or repealing a rule." (Emphasis added).

sources Defense Council v. NRC (*NRDC*), 666 F.2d 595 (D.C. Cir. 1981), carved from this rule a broad exception for all petitioners who had failed to exercise a prior opportunity to seek judicial review. The rule of *NRDC*, however, does not cut so deeply into the general principle that all final agency action is presumptively reviewable. *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979). *NRDC* merely holds that a protestant, who could have but did not seek review, may not create the basis for a reviewable order by unilaterally petitioning for repeal or amendment of a regulation.[8] To permit any complainant to restart the limitations period by petitioning for review of a rule, the *NRDC* court recognized, would eviscerate the congressional concern for finality embodied in time limitations on review.

This concern is not present in the instant case. Montana did not contrive to restart the 60-day period by unilaterally seeking repeal of a long-standing regulation. Indisputably, the agency itself initiated rulemaking procedures in 1981. It held out Section 872.11(b)(3) as a proposed regulation, offered an explanation for its language, solicited comments on its substance, and responded to the comments in promulgating the regulation in its final form. Given the affirmative indications that the agency evaluated the entire substance of the regulation, it matters little whether the agency's primary focus was on bringing the comprehensive regulatory scheme in compliance with Executive Order 12291. Unless we are to consider the notice and comment process a meaningless gesture, the order of June 1982 reissuing Section 872.11(b)(3) constitutes final agency action and is reviewable under the Administrative Procedure Act, 5

[8] Moreover, the court in *NRDC* explicitly acknowledged that where, as here, the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review. 666 F.2d at 602. *See also Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

U.S.C. § 704. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). The 60-day period for review began on June 30, 1982 and, accordingly, the petition was timely.

III. The Statutory Question

A. *Standard of Review*

This case requires us to reconcile two superficially conflicting principles of statutory interpretation. Montana raises a pure question of law, whether the challenged regulation is inconsistent with the organic statute. Accordingly, it invokes the principle that the judiciary is uniquely responsible for the final determination of the meaning of statutes. *FTC v. Colgate Pamolive Co.*, 380 U.S. 374, 385 (1965). The federal appellees, on the other hand, acknowledge the purely legal nature of the question but insist that this court should afford substantial deference to the Department of the Interior's construction of a statute it is entrusted to administer. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, —— U.S. ——, —— & n.14, 104 S.Ct. 2778, 2782 & n.14 (1984) (hereinafter cited as *Chevron* only to 104 S.Ct.) (collecting cases).

The conflict between these two principles, both thoroughly entrenched in the case law, *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1287 (D.C. Cir. 1984), is more apparent than real. Beyond question, it is the unique province of the judiciary to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). But the exercise of this function does not preclude affording deference to an agency's construction of its enabling statute. For, properly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983); *Trailways*,

Inc. v. ICC, supra, 727 F.2d at 1288. Thus the court exercises its constitutionally prescribed function as the final arbiter of questions of law when it evaluates the breadth of congressional delegation and, in so doing, determines the degree of deference warranted in the particular controversy before it.

The recent decision in *Chevron, supra*, elaborates on these principles and sets out the appropriate methodology for ascertaining whether to afford deference to an agency construction of its governing statute. At the outset, "if the intent of Congress is clear, that is the end of the matter," and contrary agency interpretations must be invalidated. 104 S.Ct. at 2781. To conclude otherwise would be to adopt the absurd position that Congress delegated authority to vitiate or disregard its intent.

Isolating the intent of Congress, of course, is often easier said than done. Thus it has become axiomatic that we must assume that Congress expresses its intent through the ordinary meaning of the words it uses. *Rubin v. United States*, 449 U.S. 424, 430 (1981); *North Dakota v. United States*, 460 U.S. 300, 312 (1983). But the language of a statute is not an inevitable proxy for legislative intent. *Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981); *Water Transport Ass'n v. ICC*, 715 F.2d 581, 593 (D.C. Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 998 (1984). If the language of one statutory phrase, however "plain," collides with the literal command of another or of the statute as a whole, the resulting ambiguity necessitates examination of extrinsic evidence of legislative intent to reconcile the conflict. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403-405 (1975). Similarly, if the "plain" language would lead to a patently "absurd" result, the assumption that the literal words embody legislative intent has considerably less force. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

If examination of the statutory language and, where appropriate, extrinsic evidence reveals that "Congress has not directly addressed the precise question at issue," the court's task is to determine whether to afford deference to an agency's effort to explicate the ambiguous language or fill the statutory void. *Chevron, supra*, 104 S.Ct. at 2782. The cases divide into two categories, roughly paralleling the sometimes fuzzy distinction between legislative and interpretive rules. First, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute * * *." *Id. See also Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In this context we are directed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), as well as the Supreme Court, *Chevron, supra*, 104 S.Ct. at 2782, to affirm the agency's construction unless arbitrary, capricious, or manifestly contrary to law. Second, if "the legislative delegation to an agency * * * is implicit rather than explicit," *Chevron* commands that the court affirm an agency's interpretation of a statute it is entrusted to administer provided that it is "reasonable." *Id. See also Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). Deference in this context, no less than in the case of explicit delegation, reflects the deep institutional premise that it is for the agency in its capacity as delegate of the legislative branch, not the court, to make policy within the boundaries assigned to it by Congress. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1979).

Applying these principles to the case at hand, we evaluate first whether the statutory language of Section 1235(g)(2) reflects a congressional intent that fees collected from mines on Indian lands outside the exterior boundaries of reservations be distributed to states rather than the tribe.[9] The literal words of the statute are

[9] We recognize that Montana has elected to challenge 30 C.F.R. § 872.11(b)(3), which allocates funds to Indian tribes,

presumptively conclusive of legislative intent, but that presumption may be defeated by contrary indications of intent also evident on the face of the statute. In that event, examination of extrinsic evidence to ascertain the congressional purpose would be necessary.

If we determine that Congress did not expressly foreclose the construction embodied in the challenged regulation, we must determine whether the agency's construction warrants deference by measuring the breadth of delegation, if any, to the agency to fill gaps or resolve statutory ambiguities and by determining whether the agency's interpretation fell within the boundaries assigned to it.[10] On the one hand, as Montana correctly notes, the absence of several of the typical indicia of broad congressional delegation to the agency counsels against deference. *Trailways, Inc. v. ICC*, *supra*, 727 F.2d at 1288. In particular, the construction embodied in 30 C.F.R. § 877.11(b)(3) required no technical or specialized expertise, a circumstance ordinarily weighing against deference.[11] *Alexander v. FERC*, 609 F.2d 543,

---

rather than § 872.11(b)(2), which allocates funds to states. Montana makes clear, however, that its objection to § 872.11(b)(3) is that it has the effect of "depriv[ing] the State of Montana and its citizens of funds needed to reclaim lands and water spoiled by coal mining." Brief for appellant at 22. Indeed, were this not the basis of its complaint, we doubt the State would have standing to mount this challenge at all. *See* text at p. 18 *infra*. Thus the critical inquiry is not only whether Congress intended that tribes be allocated funds generated by non-reservation Indian lands, but also whether it intended that states be allocated such funds.

[10] *See, e.g., Western Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th Cir. 1982) (in reviewing agency's construction of its governing statute court must determine whether agency has transgressed bounds fixed by Congress), *cert. denied*, —— U.S. ——, 104 S.Ct. 2160 (1984).

[11] *See also Trailways, Inc. v. ICC*, 727 F.2d 1284, 1288 (D.C. Cir. 1984) (established administrative practice when the statute was enacted is an indicium of delegation).

548 (D.C. Cir. 1979). Similarly, the statutory language at the center of this controversy is not "of such inherent imprecision * * * that a discretion of almost legislative scope was necessarily contemplated." *Associated Data Processing Service Organizations, Inc. v. Board of Gov. of FRS*, —— F.2d ——, —— (D.C. Cir. No. 82-1910, decided Oct. 2, 1984) (slip op. at 37).

On the other hand, one consideration weighs decisively in favor of deference. As will be developed more fully below, Congress expressly recognized that the jurisdictional status of Indian lands was too uncertain to permit effective allocation of regulatory authority for those regions. 30 U.S.C. §§ 1273, 1300. *See also* H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1974). Accordingly, it provided that, within a matter of months, it would return to the legislative task and clarify the question. Over seven years have now passed and the promise of congressional clarification remains unfulfilled. In the meantime, the Secretary is under a present obligation to collect fees for and administer the reclamation fund. Given this rather remarkably mixed message, we can only conclude that, pending congressional clarification, Congress afforded the Secretary substantial discretion in the administration of the fund on Indian lands. Thus deference is appropriate, and we will uphold the agency's interpretation provided only that it is not expressly foreclosed by congressional intent and that it is reasonable. *Chevron, supra*, 104 S.Ct. at 2782.

B. *The Plain Language*

Montana maintains that the plain meaning of the statute is controlling. It points out that Congress used the phrase "Indian reservation" throughout Subchapter IV, *see, e.g.*, 30 U.S.C. § 1239(b-c), and that Congress clearly knew the difference between the phrase "Indian reservation" and the statutorily defined term "Indian lands," which includes both reservations and lands beyond

the exterior boundaries of reservations either owned by or beneficially held for an Indian tribe. *See, e.g., id.* §§ 1273(9) & 1300(h). Montana also finds relevant Section 1273, which specifically states that, except as provided in Section 1300, the provision that commissions a study on the question, the Act "shall not be applicable to Indian lands." Thus, in its view, the only ambiguity in the statute was injected by the Secretary when he substituted "Indian lands" for "Indian reservation" in the challenged regulation.[12]

There can be no denying the initial appeal of Montana's "plain meaning" argument. Ultimately, however, we are not persuaded. The fundamental, and in the end fatal, deficiency in Montana's reading of the statute is its failure to acknowledge, much less account for, language that equally plainly compels the conclusion that Congress did not intend that funds derived from Indian lands be distributed to the states.

Montana makes clear that the gravamen of its complaint is that the regulation deprives the State of funds needed to reclaim lands and water spoiled by coal mining. Brief for appellant at 22. The State also asserts that it

---

[12] Montana also suggests that the recent decision in *Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians*, —— U.S. ——, 104 S.Ct. 2105 (1984), is "directly on point." Supplemental brief for appellant at 2. We disagree. The statutory language at issue in *Escondido* was, no doubt, similar to that at issue in this case. Far more importantly, however, *Escondido* arose under an entirely different statute, the Federal Power Act, 16 U.S.C. § 797(e). Our task is to determine Congress' intent under the Surface Mining Control and Reclamation Act of 1977. Unless the language of the Federal Power Act somehow informs this inquiry, it is of no relevance at all. Given the wholly different objectives and structure of the two Acts, and the absence of any evidence whatever that the 95th Congress was in any way influenced by the Federal Power Act, we find the language and subsequent judicial construction of that Act irrelevant to the interpretive task before us in this case.

intends to use the funds to reclaim abandoned mines on non-reservation Indian lands[13] *Id.* at 25. Yet the Act unambiguously denies the state the power to administer funds on any Indian lands, on or off the reservation. No state is eligible for funds under Section 1232(g)(2) until it has submitted, and the Secretary has approved, a "State reclamation program." *Id.* § 1232(c). The Act defines "State program" to mean "a program established by a State * * * to regulate * * * reclamation operations on *lands within such State.*" *Id.* § 1291(25) (emphasis added). And, finally, the Act defines "lands within such State" to mean "all lands within a State other than Federal lands and Indian lands." *Id.* § 1291(11). Because "Indian lands" include "mineral interests held in trust for * * * an Indian tribe." *id.* § 1291(9), the Act explicitly denies Montana the power to administer federal funds to reclaim abandoned mines on the cede strip. Thus granting Montana the funds generated by current mining operations on the ceded strip would violate the clear command of Section 1232(g)(1) that "[t]he geographic allocation of expenditures from the fund shall reflect * * * the area from which the revenue was derived."[14]

Another "plain language" obstacle that Montana fails to confront, much less surmount, is the directive of Section 1235(k) that "Indian tribes having within their jurisdiction eligible lands pursuant to section 1234 of this title or from which coal is produced, shall be considered as a 'State' for the purposes of this subchapter." Once this provision is read back into Section 1232(g)(2),

---

[13] This assertion is implicit in Montana's policy argument that "it makes good sense" for states to undertake reclamation projects when non-Indians control the surface. Brief for appellant at 25. As discussed below, *see* note 22 *infra* and accompanying text, this alleged policy finds no support in the legislative history.

[14] *See also* 30 U.S.C. § 1235(e) (to be approved a state reclamation plan must identify the areas to be reclaimed and the legal authority to perform such work).

also in Subchapter IV, the supposedly plain meaning of that provision's allocation language becomes anything but clear. Section 1232(g)(2) provides, with emphasis added, that 50 percent of the "funds collected annually in any *State* or Indian reservation shall be allocated to that *State* or Indian reservation." But Section 1235(k) requires that the Secretary treat as a "state" any tribe having jurisdiction over lands that produce coal. Thus, assuming that the Crow Tribe has "jurisdiction" over the ceded strip within the meaning of Section 1235(k),[15] 50 percent of the funds derived from the region go to it, and not Montana, a result entirely consonant with the challenged regulation.[16]

Finally, Montana's reliance on Section 1273 to "plainly" support its position fails to convince. Section 1273(a) states that "the provisions of this chapter shall not be applicable to Indian lands [except in accord with Section 1300]." This provision, of course, directly conflicts with Section 1235(k), which treats tribes having jurisdiction over coal-producing lands as states for purposes of Sub-

---

[15] The Crow Tribe maintains that the State clearly is without jurisdiction to oversee reclamation projects on Indian lands. Brief for appellee Crow Tribe of Indians. The State of Montana, on the other hand, has little doubt that it does have jurisdiction, at least over off-reservation Indian lands. Brief for appellant at 25. Whether the Crow Tribe or the State has administrative jurisdiction over regions like the ceded strip, of course, is not clear. Precisely this uncertainty compelled Congress to postpone final resolution of the locus of regulatory authority in Indian lands. *See* 30 U.S.C. § 1300(h); H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975).

[16] We acknowledge that using § 1235(k) to expand the definition of "state" in § 1232(g)(2) instead of simply using the phrase "Indian lands" rather than "Indian reservation" constitutes peculiar drafting. Accordingly we do not give the literal command of § 1235(k) dispositive force. We note only that the "plain" meaning of the statute leads us down contradictory and mutually exclusive paths, a result that justifies our looking beyond the four corners of the Act to determine the intent of Congress.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

chapter IV.[17] More importantly, Section 1273(a) defeats Montana's right to the funds collected on the ceded strip as much as it defeats that of the tribe. Somewhat surprisingly, Montana has elected to challenge 30 C.F.R. § 872.11(b)(3), which allocates funds from Indian lands to the tribes, rather than 30 C.F.R. § 872.11(b)(2), which exempts from funds allocated to the states fees collected from "Indian lands."[18] At bottom, however, as Montana admits, brief for appellant at 24, its complaint stems from its belief that it, not the Crow Tribe, is entitled to funds collected on the ceded strip. Indeed, were this not the injury that motivates the petition for review, we doubt Montana would have standing to challenge Section 872.11(b)(3) at all. But if the essence of Montana's complaint is its view that the Act confers on it a right to funds generated by the ceded strip, Section 1273 stands "plainly" and squarely in its path. For the literal

---

[17] The legislative history illuminates the source of this inconsistency. Throughout most of the Act's history Congress assumed that Indian tribes would have no direct role in either reclamation or regulation. The predecessors of §§ 1273(a) and 1300 were present in the bills passed by both the 93rd and 94th Congresses as well as in the bill that ultimately was enacted. The provision that was to become § 1235(k), on the other hand, was added in the final conference session on the bill before it was passed by the 95th Congress. Thus it appears that at the last moment Congress elected to give tribes a direct role in overseeing *reclamation* programs but failed to alter those provisions, such as § 1273, that assumed that tribes were to be entirely without administrative authority.

[18] 30 C.F.R. § 872.11(b)(2) reads in pertinent part:

> An amount equal to 50 percent of the reclamation fees collected from within a State shall be allocated at the end of the fiscal year in which they are collected for use in that State under an approved State Reclamation Plan. Reclamation fees collected from Indian lands shall not be included in the calculation to be allocated to a State. * * *

30 C.F.R. § 872.11(b)(3), which allocates funds derived from Indian lands to the Indian tribe having an interest in those lands, is quoted in note 3 *supra*.

terms of that section say that the Act "is not applicable" to Indian lands at all. If that is the case, no more than the Crow Tribe does Montana have a present right to funds derived from mining operations either inside Indian reservations or beyond their exterior boundaries. 30 U.S.C. § 1272(11).

In short, Montana's focus on the "plain meaning" of the term "Indian reservation" in Section 1232(g) is far too narrow. The equally plain but conflicting command of other terms of the statute, though not independently dispositive, is more than sufficient to defeat even the strong presumption that the words of the statute, without more, embody Congress' intent. Indeed, the ambiguities present on the face of the statute make an examination of the legislative history for evidence of that intent both necessary and appropriate.

C. *The Legislative History*

We are frank in admitting that our extensive review of the labyrinthine legislative history has yielded few certain conclusions. The long and convoluted path toward final enactment of the Act began in 1968. Hearings on S. 3132, S. 3126, and S. 217 Before Senate Committee on Interior and Insular Affairs, 90th Cong., 1st Sess. (1968). The 93rd Congress passed an earlier version of the bill in 1974, S. 425, 93d Cong., 2d Sess. (1974), but President Ford vetoed it. The 94th Congress passed a similar bill in 1975, H.R. 25, 94th Cong., 1st Sess. (1975), but it too met with a presidential veto. The legislation as it now stands was enacted by the 95th Congress and signed into law by President Carter in 1977. Each Congress made revisions in the earlier draft, but often carried over language that the subsequent changes made obsolete or internally inconsistent. Especially obscure is the relationship between Sections 1232(g), 1273(a), 1235(k) and 1300(a-h).

From this tangled skein, however, one aspect of the congressional purpose emerges with clarity. Believing that the jurisdictional status of non-reservation "Indian lands" was too unclear to permit effective allocation of regulatory authority in these regions,[19] Congress expressly postponed resolution of the question and directed that the Secretary of the Interior submit a report within six months of the enactment of the Act and "propose[] legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." 30 U.S.C. § 1300(a). No evidence supports Montana's view that the language of Section 1232 (g)(2) reflects a finely calibrated intent to permit states to reclaim non-reservation Indian lands pending congressional clarification, while limiting tribal jurisdiction to reservations. Nor does the legislative history support Montana's assertion that Congress intended that non-Indians reclaim the surface in regions where a tribe controls the subsurface minerals. In sum, we find 30 C.F.R. § 872.11(b)(3), read in conjunction with the Secretary's policy to suspend distribution of funds collected on non-reservation Indian lands, far more consonant with congressional objectives than the position asserted by Montana.

1. *The Indian lands question in the 93rd, 94th, and 95th Congresses.* In the 93rd Congress the bill that emerged from the House Committee on Interior and Insular Affairs would have given Indians full administrative authority over both reclamation and regulation of mines on "Indian lands." H.R. 11500, 93rd Cong., 2d Sess. §§ 301-311 (1974). The allocation language of current Section 1232(g) was not in the bill. But the House's clear intent was to treat Indian tribes as states and to designate Indian lands, even those off the reservation, *id.* § 705(8), under the regulatory authority of the tribes

[19] *See, e.g.*, H.R. Rep. 94-189, 94th Cong., 1st Sess. (1974).

that controlled them. H.R. Rep. 93-1072, 93d Cong., 2d Sess. 115-116 (1974).

The Senate took a different approach. *See* S. 425, 93d Cong., 2d Sess. §§ 115-116 (1973). Section 217(a) of the bill passed by the Senate stated that, except as provided in Section 403, "the provisions of this Act shall not be applicable to Indian lands." Section 403, the progenitor of Section 1300 in the current Act, commissioned the Secretary of the Interior to produce and submit to Congress a study on regulatory authority over Indian lands. The Senate Report, S. Rep. 93-402, 93d Cong., 1st Sess. (1973) (hereinafter cited as *Senate Report*), makes explicit the intent to "exempt temporarily all Indian lands from the Act," *id.* at 74, including lands controlled by a tribe but beyond the boundaries of its reservation. S. 425, 93d Cong., 1st Sess. § 510(9) (1973). The Senate bill provided that the federal government, not the states, would oversee surface mining on Indian lands pending congressional clarification of the question. The Senate bill was far clearer about the mechanisms for interim federal control of regulation than of reclamation. *See, e.g., Senate Report* at 74. But there is no doubt that the Senate envisioned no role for the states on Indian lands. To be eligible to receive reclamation funds a state must have jurisdiction over "lands within such state," S. 425, 93d Cong., 2d Sess. § 204(1) (1973), a phrase defined to "insure that the States, through their State programs, will not assert any additional authority over * * * Indian lands." *Senate Report* at 75.

In conference the conferees largely acceded to the Senate's approach to Indian regulatory authority. *See* H.R. Rep. 93-1522, 93d Cong., 2d Sess. (1974) (hereinafter *Conference Report*). The bill that emerged from conference gave Indians no authority to submit plans for either regulation or reclamation, and, like the original Senate bill, commissioned a study to investigate the subject of administrative jurisdiction over Indian lands. The

study was to include proposed legislation that would "allow Indian tribes to elect to assume full regulatory authority over the * * * regulation of surface mining of coal on Indian lands." *Id.* at 68 (§ 712(a)).

The extent of state jurisdiction over non-reservation Indian lands was slightly less clear in the bill as it emerged from conference and later passed by both Houses than in the original Senate bill. The defined term "lands within such state," which in S. 425 had explicitly excluded all Indian land from the ambit of a state reclamation program, was dropped; *compare* S. 425, 93d Cong., 1st Sess. § 204 (1973), *with Conference Report* at 20 (§ 503); and the language allocating 50 percent of the fees derived from an Indian reservation or a state to that reservation or state was added. *Id.* at 12 (§ 401(e)). One could plausibly draw from these changes the inference that the conferees, though wishing ultimately to give tribes regulatory authority over non-reservation Indian lands, *id.* at 68 (§ 712(a)), provided in the interim that states could administer reclamation plans on the off-reservation portions of those lands as long as the fees derived from reservations proper return to the reservation.

For several reasons this inference is unconvincing. The conferees could not have been clearer that ultimately they wanted Indians to administer funds on non-reservation Indian lands, *id.*; and not a whit of evidence suggests an intent that the states oversee the funds in the interim period. Indeed, though Section 401(e), unlike the bill in final form,[20] speaks only generally about the administrative vehicles through which the 50 percent allocation would be implemented, a state could only have direct control of the funds if it had submitted an approved state reclamation program. The bill passed by the 93rd Congress, no less than either the original Senate or House bills, limited the jurisdiction of state programs to lands other

[20] *Compare* 30 U.S.C. § 1232(g)(2) *with Conference Report* at 12 (§ 401(e)).

than "Federal lands" and "Indian lands" both on and off the reservation. *Id.* at 60-61 (§ 701(7), (8), (9), & (11)). Thus no evidence supports the contention that the 93rd Congress intended that the states oversee reclamation on non-reservation Indian lands or otherwise benefit from funds collected in such areas during the interim period prior to enactment of clarifying legislation.

The history of the legislation during the 94th Congress confirms this view. The Indian lands provisions were carried over essentially without change from the 93rd Congress. The Conference Report, H.R. Rep. 94-189, 94th Cong., 1st Sess. 79 (1975), makes clear that, pending enactment of legislation giving direct regulatory jurisdiction to the tribes, the combination of federal performance standards and tribal leasing authority would protect Indian lands from the potentially destructive effects of surface mining. The focus of the Conference Report was on regulation and not reclamation. But, given their recognition of the "special jurisdictional problems associated with lands held in trust for Indian tribes," *id.*, the conferees clearly intended that the states be given no role at all in the administration of reclamation programs on non-reservation Indian lands.

In the 95th Congress the surface mining bill came out of the appropriate Senate and House Committees in a form virtually identical to the bills passed by the 93rd and 94th Congresses but vetoed by President Ford. *See* S. Rep. 95-128, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-218, 95th Cong., 1st Sess. (1977). On the Senate floor, however, Senator Abourezk introduced an amendment to the Senate bill that would have given Indian tribes the option of assuming full regulatory and reclamation authority over all Indian lands. 123 Cong. Rec. 15606-15607 (1977). The amendment, which was passed without opposition or serious debate, was similar to the approach adopted, but later abandoned, by the House during the 93rd Congress. This time, however, the roles were reversed. In conference the House's current view that leg-

islation concerning Indian lands should be postponed pending completion of a study prevailed, and the Abourezk amendment was deleted. However, entirely without explanation or comment—either in conference or later on the floor of either house—the conferees added Section 1235(k), which for purposes of reclamation (but not regulation) treated Indian tribes like states. Thus, to the extent the 95th Congress altered the status of Indians under the Act at all, the change was in the direction of expanding their role in reclamation of abandoned mines on coal-producing lands within their jurisdiction. As in the 93rd and 94th Congresses, at no time did the 95th Congress evince an intent to afford states reclamation authority on non-reservation Indian lands. Indeed, once again the conferees made clear that their uncertainty about the jurisdictional status of those lands justified postponing legislation until a study on the question had been completed. H.R. Rep. 95-493, 95th Cong., 1st Sess. 114 (1977).

In sum, examination of the 95th Congress' deliberations, no more than those of earlier Congresses, yields not even a hint that the choice of the phrase "Indian reservation" in Section 1232(g)(2) reflected a conscious decision to treat on- and off-reservation lands differently. Indeed, indiscriminate use of the phrases "Indian lands" and "Indian reservations" throughout the long history of the Act suggests an inadvertent drafting inconsistency far more than a deliberate policy choice. *See, e.g.*, S. Rep. 95-128, 95th Cong., 1st Sess. 67 (1977) ("Fifty percent of the revenues derived from * * * *lands of an Indian tribe* are to be returned to that * * * Indian tribe." (emphasis added)).[21] Nor is there any support at all for Montana's assertion that Section 1232(g)(2) embodies a congressional determination that "it makes good sense"

---

[21] *See also* S. Rep. 95-128, 95th Cong., 1st Sess. 113 (1977) (letter of Secretary of the Interior Cecil Andrus); 121 Cong. Rec. 13377 (1975) (comments of Senator Melcher).

for non-Indians to oversee reclamation of lands the subsurface of which is beneficially owned by or for Indians. Brief for appellant at 25.[22] Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest.

2. *Congressional objectives and the challenged regulation.* Measured against Congress' clear objective to postpone resolution of the administrative status of Indian lands, we find the Secretary's construction of the Act far more convincing than that advanced by Montana. Montana asserts, albeit indirectly, that it has a present right to funds collected on the ceded strip. But, given Congress' clear intent to deprive states of reclamation authority over non-reservation Indian lands, we find it inconceivable that Congress wished states to benefit from funds derived from those areas. The bill passed by the 93rd Congress, like those passed by the 94th and 95th

---

[22] Indeed, both the language and the history of the Act imply that Congress did envision that Indians exercise regulatory authority even in those regions in which their interest extends only to the subsurface. The House bill in the 93rd Congress and the Senate bill in the 95th Congress clearly would have given Indians jurisdiction over lands both within and without the exterior boundaries of the reservation. Moreover, in § 1300 of the Act Congress commissioned the Secretary of the Interior to submit proposed legislation "designed to allow Indian tribes to elect to assume full regulatory authority [defined to include both regulation and reclamation (30 U.S.C. § 1291(22) & (24))] over * * * surface mining on Indian lands [defined to include non-reservation land, *id.* § 1291(9)]." Whether the policy urged by Montana is a sound one or even permissible can be debated. In statutory construction, however, "questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-221 (1980).

Congresses and finally signed into law in 1977, makes explicit the link between administrative jurisdiction and the right to funds. Throughout the Act's evolution it directed that the funds "reflect * * * the area from which the revenue was derived * * *." *Compare* 30 U.S.C. § 1232(g)(1), S. 425, 93d Cong., 1st Sess. § 401(e) (1974), *and* H.R. 25, 94th Cong., 1st Sess. § 401(e) (1975). The link is especially clear in the final form of the Act. Section 1232(e) directs that a state reclamation plan must "identify the areas to be reclaimed" and the "legal authority" to undertake reclamation operations.[23]

In contrast, the Secretary's decision to award funds derived from non-reservation Indian lands to the tribes, but to condition actual distribution on the enactment of clarifying legislation, is fully in accord with the congressional design. It conforms with both Congress' explicit intent ultimately to give tribes "full regulatory authority over * * * regulation of surface mining of coal on Indian lands," 30 U.S.C. § 1300(a), and Congress' equally clear intent to postpone the actual granting of administrative authority on Indian lands pending further study of the difficult jurisdictional questions inherent in such regions. The Secretary's commendable effort to reconcile the often starkly contradictory commands of the Act is both reasonable and consistent with the general intent of Congress. Accordingly, under the controlling standard of review, the Secretary's construction of the statute he is entrusted to administer merits deference. *Chevron, supra,* 104 S.Ct. at 2782.

---

[23] Absent such "authority," approval of a state program, a prerequisite of fund distribution under § 1232(g)(2), would violate the congressional objective that a state be authorized to protect the environment against the ravages of surface mining only to the extent it is an adequate surrogate for direct federal control.

III. Conclusion

Under controlling principles of administrative law, Montana's petition for review of 30 C.F.R. § 872.11(b)(3) is timely. Because the challenged regulation is in accord with congressional objectives and is a reasonable construction of the Act, we affirm its validity.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 82-2421

STATE OF MONTANA,

Plaintiff,

v.

JAMES G. WATT, Secretary of the Department of the Interior, *et al.*,

Defendants,

AND

CROW TRIBE OF INDIANS,

Intervenor.

FILED
June 30, 1983
Clerk, U.S. District Court
District of Columbia

MEMORANDUM OPINION

Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1231 *et seq.*, was enacted for the purpose of establishing a fund for reclamation and restoration of land adversely affected by past coal mining. This action challenges a regulation promulgated by the Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior (OSM), to implement the "Allocation of Funds" provisions of the Act, 30 U.S.C. § 1232(g).

Section 1232(g) of the Act provides, in pertinent part:

> (1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue

was derived as well as the national program needs for the funds.

(2) Fifty percentum of the funds collected annually in any State or *Indian reservation* shall be allocated to that State or *Indian reservation* by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. . . . (emphasis added)

30 U.S.C. § 1232(g)(1), (2). The disputed portion of the regulation replaced the term "Indian reservation" with "Indian lands." 30 C.F.R. § 872.11(b)(3).[1]

While only "Indian lands" is defined in the Act,[2] it is not disputed that this term is broader than "Indian reservation." Intervenor, Crow Tribe of Indians, asserts that this substitution was made "to make this section 'more consistent with other provisions of the Act' and to provide 'a more identifiable geographical area upon which to base its allocations.'" Memorandum of Crow Tribe of Indians at 5, quoting 43 Fed. Reg. 49,933. The preamble to the regulations states that the change was made "as a result of a memorandum from the Associate Solicitor, Division of Indian Affairs in the Solicitor's Office which concluded that the legislative history required such a change." 43 Fed. Reg. 49,933.

Section 872.11(b)(3) was originally published, along with other rules implementing the Act, on October 25, 1978. 43 Fed.

---

[1]Section 872.11(b)(3) provides, in pertinent part:

An amount equal to 40 percent of the reclamation fees collected from *Indian lands* shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by the tribe under an approved Indian reclamation plan. . . . (emphasis added)

[2]"'Indian lands' means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

Reg. 49,932. On June 30, 1982 OSM revised and reprinted the regulations; however, § 872.11(b)(3) was not changed. 47 Fed. Reg. 28,574.

The case is presently before the Court on cross-motions for summary judgment. Plaintiff contends that the regulation is arbitrary, capricious, and inconsistent with law, as it exceeds the authority granted to the Secretry by the plain language of the statute. The federal defendants and Crow Tribe assert that plaintiff's challenge is untimely; and assuming *arguendo* that it is timely, the regulation is consistent with legislative intent.

Crow Tribe also argues that the "ceded strip", the main area that Montana contends is within the definition of "Indian lands" but not included in "Indian reservation", is part of the reservation. This final issue was not raised in the pleadings and, in any event, does not need to be reached by the Court.[3]

I. Timeliness of Plaintiff's Challenge.

Defendants contend, and plaintiff does not dispute, that plaintiff "participated in the rulemaking procedures leading to the issuance of Section 872.11(b)(3) of the regulations, in October 1978." Federal Defendants' Statement of Material Facts ¶ 9. Thus, the State of Montana had notice of the regulations in 1978, and had the opportunity to, and did challenge them at that time.

In 1981 OSM proposed revisions to regulations *other than* § 872.11(b)(3). At that time the Governor of the State of Montana took the opportunity to again argue that § 872.11(b)(3) is not consistent with the statute. OSM refused to change § 872.11(b)(3) and issued final rules on June 30, 1982, in which

---

[3]The government also suggests that this case is not ripe since until Congress takes further action none of the money can be spent. Government Memorandum at 13-14. There is little merit to this contention, and since it is not expressly raised, it will not be specifically addressed.

it reprinted all of the rules, including the unchanged § 872.11(b)(3). Fifty-eight days later this action was filed.

Petitions for judicial review of final rules promulgated by the Secretary of the Department of the Interior (Secretary) under the Act must be filed within sixty days from the date of issuance of the rules. 30 U.S.C. § 1276(a)(1). Plaintiff asserts that the significant date is June 30, 1982, while defendants and Crow Tribe believe October 1978 was the appropriate time for judicial review.

The general rule in this Circuit was recently stated in *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 215 U.S.App.D.C. 32, 39-40, 666 F.2d 595, 602-603 (1981):

> [W]e have scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulations on demonstrable grounds of *substantive* invalidity. For example, we have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation,[48] or when changed circumstances have allegedly deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation. NRDC has cited no case, however, and we are not aware of any, that has allowed the foregoing authority to permit back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion. We have previously suggested "that those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of their issuance."[51] (other footnotes omitted)

48. *E.g.*, *Functional Music, Inc. v. FCC*, 274 (D.C.Cir.1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 81 (1959).

51. *Outward Continental N. Pac. Freight Conference v. FMC*, 385 F.2d 981, 982-83 n.3 (1967); *see also Pacific Coast European Conference v. FMC*, 376 F.2d 785, 787-788 n.4 (1967).

See also Professional Drivers Council v. Bureau of Motor Carrier Safety, No. 81-2283, slip op. at 3 n.2, 9-10 (D.C. Cir. Apr. 26, 1983).

In *Functional Music, Inc. v. F.C.C.*, 107 U.S.App.D.C. 34, 37, 274 F.2d at 546, the Court stated the following reason for sanctioning judicial review of the rules although the statutory period had expired:

> The rules here attacked were initially promulgated in 1955. It very well may be that they were then sufficiently final to support judicial review. No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible. As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity. (footnotes omitted).

In this case, however, plaintiff participated in the original rulemaking so it does not fit into the category of aggrieved parties envisioned by the court in *Functional Music*. Rather, it falls within the group of "those who have had the opportunity to challenge general rules [and] should not later be heard to complain of their invalidity on grounds fully known to them at

the time of issuance." *Outward Continental*, 128 U.S.App.D.C. 199, 200 n.3, 385 F.2d at 982 n.3.

While the United States Court of Appeals for the D.C. Circuit has made it clear that it will ordinarily allow review of agency decisions not to amend existing regulations when the claim raises substantive questions, it is in the public interest to provide review, and the agency has compiled a record, *see generally Professional Drivers Council*, slip op. at 3 n.2, 9-10, and cases cited therein, the exception applicable to parties who have previously had the opportunity to challenge the rules, embodied by *Natural Resources Defense Council* and *Outward Continental*, applies to this case. The Court, therefore finds that this action is untimely.

Nevertheless, the Court will also briefly address the substantive validity of the regulation.

II. Validity of the Regulation.

The action of OSM in promulgating the regulation must be affirmed unless such action was "arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1). This standard of review is very narrow; it accords substantial deference to the judgment of the agency. Courts must presume that the agency action was valid, and may not substitute their judgment for that of the agency. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971); *Western Coal Traffic League v. United States*, 219 U.S.App.D.C. 327, 339, 677 F.2d 915, 927, *cert. denied*, 103 S.Ct. 568 (1982); *Loyola University v. F.C.C.*, 216 U.S.App.D.C. 403, 407, 670 F.2d 1222, 1226 (1982).

The rule in question, which modifies the statutory language "Indian reservation" to "Indian lands" in determining the proper allocation of the abandoned mine reclamation fund, was engendered by a memorandum by the Associate Solicitor, Indian Affairs. *See* Exhibit 2, Crow Tribe Motion for Summary Judgment. The Associate Solicitor first stated that the Act "is at best ambiguous as to whether Congress intended the words

'Indian reservation' to mean something different from the words 'Indian lands'." He noted that Indian reservation is not defined in the Act, and then cited several instances where Congress and others have "indiscriminately used" the two terms, and other similar terms, interchangeably when discussing Indian related matters. Second, the Associate Solicitor indicated a further ambiguity in the language of a proposed section of the statute which used both terms. Third, the Associate Solicitor referred to portions of the legislative history evidencing Congress' intent to mean "Indian lands": (1) Congress intended that a percentage of the fund would go to the locale where it was collected; (2) Congress supports Indian regulation of coal mining on Indian land; and (3) if the statute was construed otherwise it would likely violate the law that States have no jurisdiction to regulate Indian lands, as well as the express prescription in the statute that "nothing in this Act shall change the existing jurisdictional status of Indian lands", 30 U.S.C. § 1300(h).

According to the legislative history the relevant portion of the statute first appeared during the 93rd Congress at § 401(e) of S. 425, as a result of amendments proferred by the Committee of Conference. H.R. Rep. No. 1522, 93rd Cong., 2dn Sess. (1974). While the conference report did not specifically address § 401(e), language in the report supports the argument that the regulation comports with Congressional intent. First, the report states that 50% of the fund is to be spent in the State where revenues are derived. Later, in the Indian lands section analysis the report indicates that the Indian tribes are to be treated like States in regard to the regulation of mining on Indian lands. H.R. Rept. No. 1522, 93rd Cong., 2nd Sess., 120 Cong. Rec. 38,280, 38,282 (1974).

Moreover, during the House debate following submission of the report it became clear that the purpose of the 50% provision was to return the funds to the State where the coal originated. 120 Cong. Rec. 38,599. This is consistent with the Associate Solicitor's analysis that to effectuate this purpose "Indian lands" is more appropriate than "Indian reservation."

In S. Rept. No. 128, 95th Cong., 1st Sess. 67 (1977), the Committee on Energy and Natural Resources specifically addressed the pertinent provision (then appearing at § 301(e)): "Fifty percent of the revenues derived from a county, school district or *lands of an Indian tribe* are to be returned to that county, school district or Indian tribe for use in accomplishing the purposes of this title." (emphasis added). The committee also reprinted a letter to Sen. Henry Jackson from then Secretary Cecil D. Andrus, which said:

> We also are of the view that the 50 percent share reserved for expenditure in the State or *Indian lands* were collected should be determined after 10 percent is allocated for hydrological studies and 20 percent for the Rural Lands Program. This would provide further funds for States having the largest amount of abandoned coal mined lands. Funds reserved to the State or *Indian land* where collected should be available for non-coal mine reclamation.

Id. at 113 (emphasis added).

On the other hand, during a debate in the Senate over another section of the Act, it was evident that at least the Senators involved in that discussion knew the difference between "Indian reservation" and "Indian lands." *See* 123 Cong. Rec. 15,608-15,610 (1977). The Crow Tribe's ceded strip is discussed. *Id.* at 15,609.

Plaintiff's position is also bolstered by the fact Congress rejected President Ford's recommendation to provide explicit authority for the Secretary to define ambiguous terms in the Act. *See* S. Rept No. 28, 94th Cong., 1st Sess. 185 (1975); S. Rept. No. 101, 94th Cong., 1st Sess. 87 (1975).

While there are persuasive arguments on both sides of the issue before the Court, the Court finds the defendants' and intervenor's position must prevail. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, es-

pecially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969) (footnotes omitted). While Congress has not addressed the regulation, the regulation has been on the books since 1978 and Congress has done nothing to change it.[4]

An appropriate Order shall issue.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

[4]Moreover, defendants point out that the fund cannot be distributed until Congress takes further action. Federal Defendants' Memorandum at 13. Thus, this issue can be submitted to Congress prior to the manifestation of any harm to plaintiff. While this fact is not sufficient for the Court to avoid the issues in this case it does mitigate plaintiff's allegation of deprivation of funds.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 82-2421

STATE OF MONTANA,

Plaintiff,

v.

JAMES G. WATT, Secretary of the Department of the Interior, *et al.*,

Defendants

AND

CROW TRIBE OF INDIANS,

Intervenor

FILED
JUNE 30, 1983
Clerk, U.S. District Court
District of Columbia

ORDER

In view of the Memorandum Opinion entered in this case on June 30, 1983, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendants' and intervenor's motions for summary judgment are granted, and it is further

ORDERED that this case is dismissed with prejudice.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1982

STATE OF MONTANA,

Appellant,

v.

WILLIAM P. CLARK, Secretary of the Department of the Interior, *et al.*

Civil Action No. 82-02421

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 6, 1985
George A. Fisher

Before Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge.

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed on November 20, 1984 be, and is hereby, amended as follows:

Page 6 3rd line from bottom of text, change "all parties agree" to read "the parties do not seriously dispute"

Page 16 7th line of text, change "§ 1232(c)" to "§ 1235" 9th line of text, change first "* * *" to "pursuant to section 1253 of this title"

10th line of text, after "*State.*" insert footnote signal "14" and insert between present footnotes 13 and 14 at the bottom of the page:

[14] Because § 1291 (25) defines "State program" to mean a program "pursuant to section 1253," a provision found in Subchapter V, Montana argues that the statutory definition of "State program" cannot refer to a state *reclamation* program established under Subchapter IV. This contention is entirely without merit. Section 1235(c) precludes approval of a state reclamation program unless the state has an approved "State regulatory program pursuant to section 1253." Approval, if any, of a state regulatory program can extend only to lands "within such State," a phrase defined to exclude Indian lands. Thus, under § 1235(c), approval of a § 1253 regulatory program that is broad enough to cover the region in question is a prerequisite to approval of a reclamation program covering that same region. This narrow statutory argument aside, we consider it highly unlikely that Congress would undertake to define "State program" and yet intend that the definition exclude operations explicitly referred to as "State programs" merely because they are provided for in Subchapter IV. *See* § 1235(a) & (d) (referring to state reclamation programs as "State programs").

Because the regulation and reclamation provisions of the statute are so interwoven, Montana's plain meaning argument has required us to examine in passing several of the Act's provisions for regulation of current and prospective mining operations. We wish to make clear that our decision is limited to the narrow question presented by this case, the rationality of a regulation providing for distribution of reclamation funds.

Renumber present footnotes 14 through 23 as 15 through 24.

Page 23 4th line from the bottom of the first full paragraph, place brackets around "associated with"

Per Curiam

For the Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 83-1982

STATE OF MONTANA
v.
WILLIAM CLARK,

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 11, 1985
George A. Fisher, Clerk

BEFORE: Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge

---

ORDER

Upon consideration of the Petition for Rehearing of the Appellant State of Montana, the Motion of Westmoreland Resources, Inc., for leave to file *amicus curiae* brief in support of Appellant's Petition for Rehearing, the lodged memorandum of the Crow Tribe of Indians in opposition thereto and of the Motion of the Crow Tribe of Indians for leave to file a brief in response to Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc*, it is

ORDERED, by the Court, that the Motion of the Crow Tribe of Indians for leave to file responsive brief is granted and the Clerk is directed to file the lodged brief, and it is

FURTHER ORDERED, by the Court, that the Clerk file the lodged memorandum of the Crow Tribe of Indians, and it is

FURTHER ORDERED, by the Court, that the Motion of Westmoreland Resources, Inc. for leave to file brief as *amicus curiae* is granted, and upon consideration of all of the foregoing it is

ORDERED, by the Court, that the Petition for Rehearing of the State of Montana is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: _____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1985

No. 83-1982

STATE OF MONTANA
v.
WILLIAM CLARK, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
February 11, 1985
George A. Fisher, Clerk

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and McGowan, Senior Circuit Judge

ORDER

The Suggestion for Rehearing *en banc* of Appellant, the response thereto and the brief of Westmorland Resources, Inc. as *amicus curiae* have been circulated to the full Court. No member of the Court had requested the taking of a vote on the Suggestion. On consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the Suggeston for Rehearing *en banc* is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY _____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1982
Civil Action No. 82-02421

STATE OF MONTANT,

Appellant,

v.

WILLIAM P. CLARK, Secretary of
Department of the Interior, *et al.*

Appeal from the United States District Court for the District of Columbia.
Before: Wright and Wald, Circuit Judges, and McGowan, Senior Circuit Judge

---

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
November 20, 1984
George A. Fisher, Clerk

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

George A. Fisher, Clerk

Date November 20, 1984
Opinion for the Court filed by Circuit Judge Wright.

(2)

No. 84-1930

Supreme Court, U.S.
FILED
OCT 1
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MONTANA, PETITIONER

v.

DONALD P. HODEL, SECRETARY
OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a regulation promulgated by the Secretary of the Interior in 1978 pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, reasonably allocates the reclamation fees collected from coal mining operations on Indian lands to the Indian tribe having an interest in those lands.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Ash Sheep Co. v. *United States*, 252 U.S. 159	2
Crow Tribe v. *Montana*, 650 F.2d 1104, cert. denied, 459 U.S. 916	2, 20
Crow Tribe v. *Montana*, No. CV-78-110-BLG (D. Mont. Sept. 10, 1985)	2, 3, 19
Escondido Mutual Water Co. v. *LaJolla Band of Mission Indians*, No. 82-2056 (May 15, 1984)	18-19
Little Light v. *Crist*, 649 F.2d 682	20
Montana v. *Hodel*, Civ. Action No. 84-3584 (D.D.C. Aug. 12, 1985)	14
Mountain States Telephone & Telegraph Co. v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985)	12
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294	12
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367	8
Zenith Radio Corp. v. *United States*, 437 U.S. 443	12

Statutes and regulations:

Act of April 27, 1904, ch. 1624, 33 Stat. 352	2
Act of May 19, 1958, 72 Stat. 121	2
§ 1, 72 Stat. 121	19
§ 2, 72 Stat. 121	19
Federal Power Act, 16 U.S.C. 791a *et seq.*:	
§ 3(2), 16 U.S.C. 796(2)	19
§ 4(e), 16 U.S.C. 797(e)	18

Statutes and regulations—Continued: Page

Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* 3
§ 3, 25 U.S.C. 463 3
§ 18, 25 U.S.C. 478 3
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 2
§ 401, 30 U.S.C. 1231 5
§ 401(c), 30 U.S.C. 1231(c) 5, 11
§ 402(g), 30 U.S.C. 1232(g) 5
§ 402(g)(1), 30 U.S.C. 1232(g)(1) 5, 16
§ 402(g)(2), 30 U.S.C. 1232(g)(2) 5, 7, 9, 12, 15, 16, 17, 18, 20
§ 402(g)(3), 30 U.S.C. 1232(g)(3) 11
§ 405(b), 30 U.S.C. 1235(b) 6
§ 405(c), 30 U.S.C. 1235(c) 17
§ 405(h), 30 U.S.C. 1235(h) 6
§ 405(k), 30 U.S.C. 1235(k) 6, 17
§ 503, 30 U.S.C. 1253 ..... 5, 17
§ 523(a), 30 U.S.C. 1273(a) 4, 5
§ 526(a)(1), 30 U.S.C. 1276(a)(1) 7, 8, 13
§ 701(9), 30 U.S.C. 1291(9) 4, 14
§ 701(11), 30 U.S.C. 1291(11) 5, 15, 17
§ 701(25), 30 U.S.C. 1291(25) 5, 17
§ 710, 30 U.S.C. 1300 ..... 4, 5, 21
§ 710(a), 30 U.S.C. 1300(a) 4
§ 710(c)-(f), 30 U.S.C. 1300(c)-(f) 4
§ 710(h), 30 U.S.C. 1300(h) 4
30 C.F.R.:
Part 750 14
Part 872:
Section 872.11(a) 5
Section 872.11(b)(1) 11
Section 872.11(b)(2) 6, 7, 10, 11, 12
Section 872.11(b)(3) 6, 7, 8, 10, 12, 13, 14, 15, 18
Section 872.11(b)(4) 11
Section 872.11(b)(5) 11
Part 888 21

Miscellaneous: Page

43 Fed. Reg. (1978):
p. 49932 6
p. 49941 6
46 Fed. Reg. (1981):
p. 60778 7
p. 60782 7
p. 60790 7
47 Reg. Reg. (1982):
p. 28574 7
p. 28580 ..... 6, 7
p. 28592 7
p. 28596 7
54 I.D. 559 (1934) 3
S. Rep. 95-128, 95th Cong., 1st Sess. (1977) 18

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1930

STATE OF MONTANA, PETITIONER

v.

DONALD P. HODEL, SECRETARY
OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), as amended by order dated February 6, 1985 (Pet. App. 38a-40a), is reported at 749 F.2d 740. The opinion of the district court (Pet. App. 28a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on November 20, 1984, and the petition for rehearing was denied on February 11, 1985 (Pet. App. 41a-42a). By order dated May 6, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including June 11, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the allocation of reclamation fees collected pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, from coal mining operations in an area of Montana known as the "ceded strip." That area and the coal underlying it have a unique jurisdictional history.

The ceded strip, which is directly adjacent to the Crow Reservation, was ceded by the Crow Tribe to the United States by the Act of April 27, 1904, ch. 1624, 33 Stat. 352. The land was to be opened for entry by non-Indians, with the Tribe to receive the proceeds from the eventual disposition of the land. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 163-166 (1920). However, the patents issued to non-Indians for the surface rights in 70,000 acres of coal lands in the ceded strip reserved the rights in the underlying minerals in favor of the United States. *Crow Tribe* v. *Montana*, No. CV-78-110-BLG (D. Mont. Sept. 10, 1985), slip op. 6. This had the effect of retaining those mineral interests for the beneficial interest of the Crow Tribe in the event that they eventually were disposed of to non-Indians under the mining laws or otherwise. Pet. App. 6a; *Crow Tribe* v. *Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982).

By the Act of May 19, 1958, 72 Stat. 121, all "vacant and undisposed-of ceded lands" on the Crow Reservation (*i.e.*, undisposed-of lands in the ceded strip) and similar lands on several other Indian reservations were restored to full tribal ownership. The 1958 Act had the effect of preventing disposition of the

affected lands under the public land or mining laws. The United States District Court for the District of Montana has recently held, in conformity with the longstanding position of the Department of the Interior, that the undisposed-of subsurface mineral rights on the ceded strip that had been reserved when the surface was sold to non-Indians are included among the "vacant and undisposed-of ceded lands" that were restored to full tribal ownership by the 1958 Act. See *Crow Tribe* v. *Montana*, *supra*, slip op. 6-11.[1]

2. a. The Surface Mining Control and Reclamation Act was enacted in 1977 for the purpose of regulating current and future mining activities and "to promote the reclamation of mined areas left without adequate reclamation" prior to the Act's effective date of August 3, 1977. The Act provides for a comprehensive and intricate program of regulation of mining activities by the federal and state governments.

However, when it passed the Act, Congress deferred a final decision regarding the regulation of

---

[1] The undisposed-of surface lands and subsurface mineral rights in the Crow ceded area had been withdrawn from entry by the Secretary several months after passage of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, in anticipation of their possible restoration to full tribal ownership pursuant to Section 3 of the IRA, 25 U.S.C. 463. See 54 I.D. 559, 561-563 (1934). However, because the Crow Tribe elected not to accept the provisions of the IRA (see 25 U.S.C. 478), the undisposed-of surface lands and minerals were not actually restored to the Tribe pursuant to the IRA. The 1958 Act was passed for that purpose. See *Crow Tribe* v. *Montana*, *supra*, slip op. 6-7. In the recent *Crow Tribe* decision, the district court held that the State of Montana could apply its severance and other taxes to the extraction of the Tribe's coal on the ceded strip.

mining on "Indian lands." The term "Indian lands" is defined for purposes of the Act to mean "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. 1291(9). The coal in the ceded strip in Montana, which is held in trust by the United States for the Crow Tribe, clearly constitutes "Indian lands" under this definition.

Congress's deferral of a final decision regarding such lands is most clearly manifest in Section 710 of the Act, 30 U.S.C. 1300. Paragraph (a) of that section required the Secretary to "study the question of the regulation of surface mining on Indian lands which will achieve the purpose of [the Act] and recognize the special jurisdictional status of these lands." The Secretary was directed by paragraph (a) to consult with Indian tribes in carrying out this study and to include in his report "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." The Secretary was further directed by paragraph (h) of the same section to "analyze and make recommendations concerning the jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations." 30 U.S.C. 1300(h). In the meantime, paragraphs (c) through (f) of Section 710, 30 U.S.C. 1300(c)-(f), provide for the regulation of active mining on "Indian lands." Presumably because of the uncertainty regarding how these questions concerning Indian lands would ultimately be resolved, Section 523(a) of the Act, 30 U.S.C. 1273(a), states that "except as provided in

[30 U.S.C. 1300], the provisions of [the Act] shall not be applicable to Indian lands." To further implement this principle, "Indian lands" are expressly excluded from the definition of the term "lands within any State," which in turn limits the geographic scope of a state's program that the Secretary may approve for the regulation of current mining and related reclamation activities. See 30 U.S.C. 1291(11) and (25), 1253.

Although Section 523(a) states that the Act shall not apply to Indian lands (except as provided in 30 U.S.C. 1300), Subchapter IV, which governs the reclamation of mining areas that were abandoned prior to the August 3, 1977 effective date of the Act, by its terms *does* apply to Indian lands. Section 401 of the Act, 30 U.S.C. 1231, establishes an "Abandoned Mine Reclamation Fund" to be administered by the Secretary of the Interior. The Fund is to be used, inter alia, for the reclamation and restoration of land and water resources that were harmed by past mining activities. 30 U.S.C. 1231(c). Money in the Fund is derived primarily from a reclamation fee imposed on operators of active coal mines. 30 U.S.C. 1231; 30 C.F.R. 872.11(a).

Section 402(g) of the Act, 30 U.S.C. 1232(g), addresses the allocation of money in the Fund. Under Subsection 402(g)(1), "[t]he geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds." Section 402(g)(2) then provides in pertinent part:

> Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned

> mine reclamation program to accomplish the purposes of this subchapter.

Section 405(k), 30 U.S.C. 1235(k), further states that Indian tribes that have "within their jurisdiction" either abandoned lands eligible for reclamation or lands from which coal is currently being produced "shall be considered as a 'State' " for the purposes of the abandoned mine reclamation program under Subchapter IV.

b. As part of the comprehensive regulations promulgated in 1978 to implement the abandoned mine reclamation program under Subchapter IV of the Surface Mining Act, the Secretary issued regulations for the allocation of reclamation fees from the Fund. 43 Fed. Reg. 49932, 49941 (1978). Under 30 C.F.R. 872.11(b)(2), 50% of the reclamation fees collected within a state shall be allocated to that state for use in connection with an approved state reclamation plan. However, this regulation further provides that "[r]eclamation fees collected from Indian lands shall not be included in the calculation of amounts to be allocated to a State."

Similarly, 30 C.F.R. 872.11(b)(3) provides that 50% of the reclamation fees collected from "Indian lands" shall be allocated to the Indian tribe having an interest in those lands for use by that tribe under an approved Indian reclamation program. However, the Secretary consistently has construed the Act not to permit the approval of a *reclamation* plan submitted by an entity if that entity does not also have an approved *regulatory* program under Subchapter V. Pet. App. 4a; 47 Fed. Reg. 28580 (1982); see 30 U.S.C. 1235(b) and (h). Because Indian tribes are not eligible to submit plans for the regulation of current mining activities on Indian lands, the money al-

located to a tribe under 30 C.F.R. 872.11(b)(3) is not actually paid to the tribe. Although the State of Montana participated in the rulemaking proceedings in 1978, it did not challenge the regulations governing the allocation of reclamation fees (Pet. App. 7a). Under 30 U.S.C. 1276(a)(1), any judicial challenge to those regulations was barred after the passage of 60 days.

3. a. On December 11, 1981, the Secretary issued proposed rules governing the strip mining program (46 Fed. Reg. 60778), and on June 30, 1982, those regulations were promulgated in final form. 47 Fed. Reg. 28574 (1982). The regulations contained the two provisions governing the allocation of reclamation fees to states and Indian tribes in the same form in which they had been promulgated in 1978. 46 Fed. Reg. 60782, 60790 (1981); 47 Fed. Reg. 28580, 28592, 28596 (1982).

This time, however, the State of Montana sought judicial review of 30 C.F.R. 872.11(b)(3), which provides for the allocation to Indian tribes of reclamation fees collected from lands in which they have an interest. Pet. App. 8a. Montana argued that because 30 U.S.C. 1232(g)(2) provides that 50% of the reclamation fees "collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation," the regulation should have allocated to Indian tribes only reclamation fees collected from within the exterior political boundaries of an Indian reservation, not fees from other "Indian lands" that lie outside those boundaries.[2] Montana did not, however, challenge 30 C.F.R. 872.11(b)(2),

---

[2] Although the State of New Mexico objected to the regulation on similar grounds during the administrative proceedings (Pet. App. 8a), it did not join Montana in this judicial challenge.

which requires the exclusion from the allocation to a state of any reclamation fees collected from "Indian lands" within that state. Pet. App. 18a.

The district court granted summary judgment for the Secretary (Pet. App. 28a-36a). The district court first concluded that because 30 C.F.R. 872.11(b)(3) was repromulgated in 1982 in the identical form in which it was promulgated in 1978, Montana now is barred from challenging the regulation because it did not seek judicial review of that regulation within 60 days of the date on which it was first promulgated in 1978. The court rested this conclusion on 30 U.S.C. 1276(a)(1), which requires that any challenge to regulations be brought within 60 days. Pet App. 30a-33a. The district court also sustained the regulation on the merits. *Id.* at 33a-36a. It reasoned that "'[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.'" Pet. App. 35a-36a, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

b. The court of appeals affirmed (Pet. App. 1a-27a). It disagreed with the district court's conclusion that Montana's challenge to the regulation is entirely foreclosed by virtue of Montana's failure to challenge the regulation in 1978. The court of appeals concluded that because, in its view, "an agency decision not to amend longstanding rules after a notice and comment period is reviewable agency action" (Pet. App. 8a), the Secretary's repromulgation of the regulation in 1982 was new agency action subject to judicial review within 60 days pursuant to 30 U.S.C. 1276(a)(1). Pet. App. 7a-10a.

However, on the merits, the court of appeals agreed with the district court. It noted the "initial appeal"

of the State's reliance on the use of the words "Indian reservation" in 30 U.S.C. 1232(g)(2) as a basis for arguing that reclamation fees should not be allocated to an Indian tribe from all Indian lands (Pet. App. 15a). But on more careful examination of the statute as a whole, including several other provisions that it found to be facially inconsistent with such an interpretation, the court of appeals rejected the State's argument based on the supposedly "plain meaning" of 30 U.S.C. 1232(g)(2) standing alone (Pet. App. 14a-19a). After a detailed study of the legislative history (*id.* at 19a-26a), the court of appeals concluded (*id.* at 24a):

> In sum, examination of the 95th Congress' deliberations, no more than those of earlier Congresses, yields not even a hint that the choice of the phrase "Indian reservation" in Section 1232(g)(2) reflected a conscious decision to treat on- and off-reservation lands differently. Indeed, indiscriminate use of the phrases "Indian lands" and "Indian reservations" throughout the long history of the Act suggests an inadvertent drafting inconsistency far more than a deliberate policy choice. * * * Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest.

ARGUMENT

The court of appeals correctly rejected Montana's belated challenge to a regulation concerning the allocation of reclamation fees that was first adopted by the Secretary in 1978 and that Montana did not challenge at that time. Congress decided in 1977 not to give the states jurisdiction to regulate current mining and related reclamation activities on Indian lands such as the ceded strip, choosing instead to postpone that question for resolution in subsequent legislation. The Secretary has simply determined that reclamation fees from Indian lands likewise should not be allocated to the states. The ruling below on this narrow question concerning the reasonableness of the Secretary's implementation of the relevant statutory provisions does not conflict with any decision of this Court or of another court of appeals, and it presents no issues of broad importance warranting review by this Court.

1. As an initial matter, we note that Montana sought judicial review only of one of the two regulations that allocate reclamation fees. The regulation the State has challenged, 30 C.F.R. 872.11(b)(3), provides that 50% of the reclamation fees collected from "Indian lands" are to be allocated to the Indian tribe having an interest in those lands. However, even if the State were correct that this regulation is invalid to the extent it allocates to the Indian tribe fees collected from Indian lands located outside the exterior boundaries of the tribe's reservation, that invalidation would not automatically increase the *State's* allocated share.

A separate regulation, 30 C.F.R. 872.11(b)(2), determines the allocation that Montana itself is entitled to receive. Section 872.11(b)(2) provides that

50% of the reclamation fees collected within a state are to be allocated to that state, but it expressly excludes fees collected from "Indian lands" in calculating that amount. Montana did not challenge the exclusion in 30 C.F.R. 872.11(b)(2) of fees collected from "Indian lands." Because that exclusion would remain in effect even if this Court were to grant review and hold that 50% of the fees collected from Indian lands outside of an Indian reservation should not be allocated to the tribe concerned, the 50% share of reclamation fees collected from the ceded strip would not be reallocated to Montana. Instead, under the governing regulations, the ceded strip fees no longer allocated to the Crow Tribe would become available to the Secretary, in his discretion, for expenditure anywhere in the Nation to meet the purposes of the Act. 30 C.F.R. 872.11(b)(5); 30 U.S.C. 1231(c), 1232(g)(3).[3] Thus, contrary to the State's suggestion (Pet. 8, 14), even if this Court were to invalidate the regulation Montana challenges, the result would not be an automatic increase in the amount of funds available to the State.[4] All else aside, this

---

[3] Under the Act and implementing regulations, whatever reclamation fees are *not* allocated to a state or Indian tribe (*e.g.*, the 50% share that is not routinely allocated to the state or tribe in the first instance) are pooled on a nationwide basis. A portion of those fees is administratively allocated to certain purposes, and the remainder is available for expenditure by the Secretary, in his discretion, to meet particular reclamation needs in any eligible area. 30 U.S.C. 1232(g)(3); 30 C.F.R. 872.11(b)(1), (4) and (5).

[4] The Act and implementing regulations provide that any money allocated to a state or Indian tribe that has not actually been ~~granted to~~ spent by the state or tribe within 3 years shall then be available to the Secretary as part of the nationwide pool of un-

absence of any direct and immediate financial consequences for the State counsels against review by this Court.

2 a. In any event, the district court and court of appeals correctly rejected Montana's challenge to the regulation that allocates to the tribe concerned the fees collected from Indian lands. The regulation, 30 C.F.R. 872.11(b)(3), was first promulgated in 1978, as part of the original set of comprehensive regulations to implement the 1977 Act. Under this Court's decisions, that contemporaneous interpretation of the Act by the agency charged with its implementation is entitled to particular deference. See, *e.g.*, *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985), slip op. 15-16; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

However, more than judicially fashioned principles of statutory construction require deference to this

---

allocated fees. 30 U.S.C. 1232(g)(2); 30 C.F.R. 872.11(b)(2) and (3). As explained above (see page 6, *supra*), the Secretary has not approved any abandoned mine reclamation plans submitted by Indian tribes, because tribes do not have authority to regulate current mining activities on Indian lands. As a result, the funds that are allocated to Indian tribes cannot actually be granted to the tribes, and they accordingly are retained in the general pool. The Department of the Interior has not construed the Act or regulations to begin the running of the three-year period for the expenditure of funds until the state or Indian tribe has actually been granted money under an approved plan. The three-year period therefore has not yet begun to run with respect to fees derived from the ceded strip.

contemporaneous implementation of the Act. Montana failed to seek judicial review of the regulation when it was promulgated in 1978, and any judicial challenge to the original regulation was barred after the passage of the 60-day period for judicial review allowed by 30 U.S.C. 1276(a)(1). The court of appeals held that the State's current judicial challenge to the regulation is not time barred only because the Secretary repromulgated it in 1982. See Pet. App. 7a-10a. Even assuming that the court of appeals was correct that judicial review of the administrative interpretation embodied in 30 C.F.R. 872.11(b)(3) is not *entirely* foreclosed at the present time, a court must be extremely reluctant to overturn the Secretary's decision not to alter a regulation that was included in the original implementing regulations and was not challenged at that time.

The obvious purpose of the 60-day time limit Congress imposed on the bringing of a suit to challenge regulations implementing the complex Surface Mining Act was to accord finality to the Secretary's interpretation and implementation of the Act. In this case, Montana has not pointed to any new evidence of legislative intent that was not available when the regulation first was promulgated in 1978 and that should now unsettle the finality of the Secretary's original interpretation. The State is simply revisiting a question that was previously decided by the Secretary. Only the most compelling indications that the Secretary was wrong would warrant setting aside the administrative interpretation at this late date, especially since Congress reserved to itself the ultimate resolution of matters pertaining to Indian lands when it enacted the Surface Mining Act in 1977. Montana has offered no such compelling indi-

cations. To the contrary, the Secretary's method of allocation reflected in 30 C.F.R. 872.11(b)(3) remains entirely reasonable.

b. As we have explained above (see pages 4-5, *supra*), Congress has unambiguously barred the states from assuming any direct role in the regulation of current mining activity on Indian lands, at least until Congress has enacted additional legislation addressing that subject. Under the statutory scheme, Montana does not have independent authority to regulate the current mining of tribally owned coal on the ceded strip.[5] It would be anomalous for Congress to

---

[5] The State of Montana has disputed the Secretary's position that it does not have authority to regulate the mining of the Crow Tribe's coal on the ceded strip, and it has purported to apply the pertinent provisions of Montana law to that mining. Montana accordingly brought a separate suit to challenge other sections of the Secretary's regulations (30 C.F.R. Pt. 750 (establishing the Federal Program for Indian Lands)) insofar as they provide for direct enforcement of the Act by the Secretary on the ceded strip. On August 12, 1985, the Secretary and the State of Montana entered into a Memorandum of Understanding in settlement of that litigation. See *Montana* v. *Hodel*, Civ. Action No. 84-3584 (D.D.C. Aug. 12, 1985).

The Memorandum of Understanding provides for the application of the more stringent of either the federal or state standards, and assigns to the State the administrative responsibility for inspection and enforcement in the first instance. However, the Memorandum of Understanding expressly does *not* purport to resolve the question whether lands within the ceded strip are "Indian lands," as defined in 30 U.S.C. 1291(9), for purposes of the Act; whether the federal program for regulation of current mining activities on Indian lands applies to the ceded strip; or whether Montana may apply its state program to the ceded strip. See Art. XV(c).

The Memorandum of Understanding also expressly states that it does *not* affect the question of entitlement to reclama-

have intended that Montana nevertheless is entitled to receive 50% of the reclamation fees imposed on that same mining activity. The State has not pointed to anything in the legislative history to support that result. Nor is that result compelled by the text of the Act, as the State maintains.

Under 30 U.S.C. 1232(g)(2), the section of the Act upon which the State exclusively relies, 50% of the reclamation fees collected "in any State or Indian reservation" shall be allocated to that State or Indian reservation. Even if the State were correct that the ceded strip is not embraced within the term "Indian reservation," it does not follow that the ceded strip therefore is within the "State," as the quoted term is used in the Act, and that 50% of the fees derived from the ceded strip therefore must be reallocated to Montana. As we previously have noted, 30 U.S.C. 1291(11) specifically excludes "Indian lands" from the term "lands within any State" for purposes of the Act. In light of this definition, the term "State" as used in 30 U.S.C. 1232(g)(2) reasonably can be construed in a similar manner to exclude "Indian lands" for purposes of allocating fees to a state.

By the same token, there is nothing on the face of 30 U.S.C. 1232(g)(2) that prohibits the allocation of reclamation fees from the ceded strip to the Crow Tribe. Section 1232(g)(2) establishes a *minimum* amount of money to be allocated to states and Indian tribes. Accordingly, even if the term "Indian reser-

---

tion fees collected from mining activities on the ceded strip. Art. XV(a). It therefore does not affect the validity of 30 C.F.R. 872.11(b)(3) insofar as it administratively allocates these fees to the Crow Tribe.

We have lodged a copy of the Memorandum of Understanding with the Clerk of this Court.

vation" as used in that section is read in a narrow, technical sense to exclude coal-bearing lands held by the United States in trust for a tribe but located outside the political boundaries of its reservation, it does not follow that the Secretary would be prohibited from allocating funds to the Indian tribe in addition to 50% of the fees derived from within the political boundaries—namely, the fees that are collected on the tribe's "Indian lands" outside of those boundaries. Thus, even accepting the State's interpretation of the term "Indian reservation," the regulation the State challenges is valid.

c. In any event, it was entirely reasonable for the Secretary to conclude that Congress did not intend to use the term "Indian reservation" in its narrowest sense when it enacted 30 U.S.C. 1232(g)(2), and therefore to conclude that the tribe concerned rather than the state should be allocated the reclamation fees from an area, such as the ceded strip, in which an Indian tribe owns the coal. Congress's manifest intent to exclude the states from assuming any role under Subchapter V with regard to current mining activities on such lands in itself is a persuasive indication of such congressional intent. In this respect, 30 U.S.C. 1232(g)(1) specifically provides that the geographic allocation of expenditures is to reflect "the area from which the revenue was derived"; this language suggests that it is reasonable for the Secretary to take into account the Indian character of the area from which fees in the ceded strip are derived in providing for the allocation of those funds.

Moreover, as the State concedes (Pet. 12 n.9), in order for a state to be entitled to receive *any* reclamation fees under Subchapter IV, it must have an approved program for the regulation of current mining

and related reclamation activities under Subchapter V. 30 U.S.C. 1235(c), 1253. Such a state program under Subchapter V is expressly limited to "lands within such State" (30 U.S.C. 1291(25)), a term that excludes "Indian lands" (30 U.S.C. 1291(11)). Because Congress directly linked the state's abandoned mine reclamation program to its current regulatory program in this manner, it was reasonable for the Secretary to conclude that Congress intended to allocate fees to the state for expenditure under its abandoned mine reclamation program in a manner that likewise excludes Indian lands. As a result, the Secretary reasonably construed Section 1232(g)(2) to give effect to that intent by including within the term "Indian reservation" all Indian lands that are excluded from the state's jurisdiction.

There is still other statutory language that reinforces this conclusion. Under 30 U.S.C. 1235(k), "Indian tribes having within their jurisdiction * * * lands * * * from which coal is produced" are considered as a "State" for purposes of Subchapter IV. The coal-producing lands in the ceded strip—in which the Crow Tribe retained its beneficial interest between 1904 and 1958 and which were restored to full tribal ownership in 1958—surely can be regarded as "within the[] jurisdiction" of the Crow Tribe for purposes of 30 U.S.C. 1235(k). Accordingly, the Crow Tribe, like Montana, is a "State" for purposes of Subchapter IV. Under the statutory formula, 50% of the fees collected in that "State" (*i.e.*, within the Tribe's jurisdiction on the ceded strip) are to be allocated to that "State" (*i.e.*, to the Tribe). As the court of appeals concluded (Pet. App. 16a-17a), this provision reinforces the reasonableness of construing 30 U.S.C. 1232(g)(2) as a whole to contemplate alloca-

tion of reclamation fees from Indian lands to the tribe concerned, and therefore of construing the term "Indian reservation" to include all such Indian lands.

The reasonableness of this interpretation is confirmed by the court of appeals' review of the legislative history (see Pet. App. 20a-25a), which generally reflects an absence of any differentiation by Congress between Indian lands within the political boundaries of a reservation and such lands outside those boundaries. The Senate Report on the 1977 Act, for example, states that "[f]ifty percent of the revenues derived from * * * *lands of an Indian tribe* are to be returned to that * * * Indian tribe." S. Rep. 95-128, 95th Cong., 1st Sess. 67 (1977) (emphasis added). This committee report language directly supports the challenged regulation. And application of that regulation to the ceded strip is particularly appropriate, because the ceded strip is immediately adjacent to the Crow Reservation and was originally within the political boundaries of that Reservation. Thus, this case does not involve the application of 30 C.F.R. 872.11(b)(3) to a wholly separate and newly acquired tract that lacks any substantial nexus to a tribe's historic reservation.

Contrary to the State's contention (Pet. 9-11), the Secretary's implementation of Section 1232(g)(2) in this manner is not inconsistent with the Court's decision in *Escondido Mutual Water Co.* v. *LaJolla Band of Mission Indians*, No. 82-2056 (May 15, 1984). There the Court considered the meaning of the term "reservation" in Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), and concluded that it did not extend to water rights of the tribes involved. Slip op. 14-18. But the Court noted that the statutory definition of the term "reservation"

even in the Federal Power Act includes "lands and interests in lands owned by the United States" (slip op. 15 & n.24, quoting 16 U.S.C. 796(2)). Here, of course, the mineral rights in the coal-producing lands in the ceded strip are interests in land owned by the United States for the benefit of the Crow Tribe. Moreover, in this case, a number of provisions of the Surface Mining Act make clear Congress's intent to exclude the states from assuming a role even with respect to Indian lands that are located outside the formal political boundaries of an Indian reservation. These unique statutory provisions of course were absent in *Escondido*.

d. Finally, even if Montana were correct that only fees derived from an "Indian reservation" in the narrowest sense may be allocated to an Indian tribe, the regulation it challenges nevertheless is valid as applied to the Crow Tribe's coal in the ceded strip. As we have explained above (see pages 2-3, *supra*), in the Act of May 19, 1958, Congress restored to full tribal ownership all "vacant and undisposed-of ceded lands" on the Crow Reservation. The District Court for the District of Montana recently held, in conformity with the Secretary's longstanding position, that the quoted phrase restored to tribal ownership not only surface lands in the ceded strip, but undisposed-of subsurface mineral interests as well. *Crow Tribe* v. *Montana*, slip op. 5-10. Significantly, Section 2 of the 1958 Act provides that the lands affected "are hereby added to and made a part of the existing reservations for such tribe or tribes." If the mineral rights were restored to the Crow Tribe pursuant to Section 1 of the 1958 Act, then those mineral rights also were added to the then-existing Crow Reservation pursuant to Section 2 of the same

Act. But *see Crow Tribe* v. *Montana*, *supra*, slip op. 43. Accordingly, those mineral rights are part of an "Indian reservation" for purposes of the allocation of reclamation fees under 30 U.S.C. 1232(g)(2).[6]

We do not suggest that the surface area of these coal-producing lands in which the Tribe owns only the subsurface mineral rights were included within the political boundaries of the Crow Reservation, such that the State does not have jurisdiction and the Tribe does have jurisdiction over activities occurring on the surface generally. See *Little Light* v. *Crist*, 649 F.2d 682, 685 (9th Cir. 1981); cf. *Crow Tribe* v. *Montana*, *supra*, 650 F.2d at 1107; *Crow Tribe* v. *Montana*, *supra*, slip op. 43. But at least for purposes of the allocation of fees collected from the mining of coal on the ceded strip, which was made part of the "reservation" by the 1958 Act, the reference in 30 U.S.C. 1232(g)(2) to an "Indian reservation" must be understood to include the coal deposits in the ceded strip that are held by the United States in trust for the Crow Tribe.

3. Contrary to the State's assertion (Pet. 14), the regulation it challenges does not render the ceded strip a "regulatory no-man's land" with respect to reclamation of abandoned mines. If any such reclamation work needs to be done, the Secretary may spend money for that purpose from the unallocated portion of the reclamation fees that are available for use, in his discretion, in any eligible area. See note 3, *supra*. Moreover, the Secretary has established an interim program for such reclamation activities on Indian lands, pending the resolution by Congress of the broader jurisdictional questions involving such

---

[6] The court of appeals did not reach this question. See Pet. App. 6a n.5.

lands that is contemplated by 30 U.S.C. 1300. See 30 C.F.R. Pt. 888. In light of the Memorandum of Understanding between the Secretary and the State concerning regulation of current mining activities on the ceded strip (see note 5, *supra*), it seems likely that cooperative measures could be taken as well with respect to any reclamation activities concerning abandoned mining areas, if any, on the ceded strip.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

OCTOBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 20026

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MONTANA,
Petitioner,

v.

DONALD P. HODEL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 444-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

POINT 1 1

POINT 2 4

POINT 3 5

POINT 4 6

POINT 5 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES:	Page
Chevron, U.S.A. v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984)	8
Crow Tribe of Indians v. *United States*, D.C. Mont.	2, 3, 5
Escondido Mutual Water Co. v. *LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Indians*, 104 S. Ct. 2105 (1984)	7, 8

STATUTES AND REGULATIONS:	
30 U.S.C. § 1232(g)	1, 3
30 U.S.C. § 1232(g)(2)	2, 5, 8
30 U.S.C. § 1232(g)(3)	8
30 U.S.C. § 1233	5
30 U.S.C. § 1235(b)	5
30 U.S.C. § 1273	8
30 U.S.C. § 1300(h)	4
30 C.F.R. § 872.11(b)(2)	6
30 C.F.R. § 872.11(b)(3)	5, 6
H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 98-99 (1977)	5
S. Rep. No. 95-128, 95th Cong., 1st Sess. 67 (1977)	4
S. Rep. No. 95-337, 95th Cong., 1st Sess. 98-99 (1977)	5
Rule 54(c), Fed. Rules Civ. Pro.	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1930

STATE OF MONTANA,

Petitioner,

v.

DONALD P. HODEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

---

1. Respondents' opposition confirms the importance of this case. Millions of dollars in Subchapter IV abandoned mine reclamation fees have been collected on the ceded strip and the total is mounting yearly. Although respondents acknowledge that Congress intended these fees to be used for reclamation there, that is not what is happening. Despite Congress' directive in Section 1232(g) of the Act, the money sits in the federal treasury, undistributed and unused for reclamation. Indeed, according to respondents, it never will be used for its intended purpose. The State of Montana cannot conduct reclamation with the funds

because the regulation at issue allocates these millions of dollars to the Crow Tribe. But the Crow Tribe cannot qualify for the funds because, under the Act, Indian tribes are not authorized to regulate reclamation activities outside their reservations.

Respondents' efforts to justify this anomalous situation expose the irrationality of the regulation. The only fees Congress allocated to an "Indian reservation" were those collected on the "Indian reservation" (30 U.S.C. § 1232(g)(2)). Respondents suggest, however, that Congress blundered, that it should have also allocated fees collected *outside* an Indian reservation to the tribe having an interest in the coal being mined there. Thus, respondents say, the Secretary could so amend the statute through rulemaking because Congress would have wanted the Secretary to consider "the Indian character of the area from which fees in the ceded strip are derived" and because Congress barred Montana from regulating current surface mining in that area. Brief in Opp., at p. 16.

Neither of these "rationales" is valid, neither was even suggested by the Secretary as a reason for the regulation, and both disregard the fundamental principle that statutory amendments are for Congress and Congress alone.

As to respondents' first rationale, the "character" of the ceded strip, far from being "Indian" in nature, is distinctly "non-Indian." See *Crow Tribe of Indians* v. *United States,* No. CV-78-110-BLG, decided Sept. 10, 1985, U.S. D.C. Mont., reprinted in App. 1-A—46-A, *infra.* "Neither the Crow Tribe nor the Bureau of Indian Affairs provides fire protection, roads, police, or other governmental services on the ceded strip.

None of the Crow Tribe's ordinances apply on the ceded strip area, and in its constitution the Tribe has disclaimed jurisdiction outside the boundaries of its reservation." App., *infra,* 15-A. The area is populated by non-Indians and the entire burden of coal development has fallen on the State, its political subdivisions and its citizens. App., *infra,* 18-A—21-A. "The only functions performed by the Crow Tribe . . . on the ceded strip relate to the Tribe's status as a royalty owner and not to its status as a sovereign." The Tribe's "interest in the ceded strip is limited to the interests of any other coal lessor" and, accordingly, the Tribe provides no governmental services there. App., *infra,* 18-A.

The Crow Tribe therefore does not, indeed cannot, have the slightest interest in conducting Subchapter IV reclamation work on the ceded strip. The only place the Crow Tribe (or any other Indian tribe) could engage in reclamation activities such as building roads, constructing public facilities, improving streams and so forth[1] would be on the Tribe's reservation, which is why Congress wrote Section 1232(g)(2) as it did, allocating only those abandoned mine reclamation fees collected on an Indian reservation to that reservation.

With respect to respondents' further contention that the Act forbids the State from regulating current surface mining on the ceded strip, the contention is flatly wrong. The State of Montana has always regulated surface coal mining on the ceded strip; the State did so prior to passage of the Act and it is doing so today. Indeed, the Department of the Interior itself

---

[1] See 30 U.S.C. § 1232(g).

acknowledged this in an agreement with the State, which respondents have lodged with the Court.[2] Moreover, a recent decision of the Montana federal district court found that with respect to mining and reclamation on the ceded strip, "Montana has historically taken the lead and continues to take the lead and do the bulk of the regulatory work." App., *infra*, 16-A—17A. In passing the Act, Congress expressly preserved the "existing jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations" (30 U.S.C. § 1300(h)). The existing jurisdictional status of the ceded strip was and is State regulation of surface coal mining.[3]

2. Respondents also claim that one sentence in a Senate Report supports the Secretary's rewriting of the statute.[4] It does not. The Senate Report provides

---

[2] This Memorandum of Understanding between the Secretary and the State of Montana, dated August 12, 1985, recognizes that "the State of Montana has applied its surface coal mining control laws to coal mining on the Crow Ceded Area within the State, and has issued permits and revisions thereto" (p. 1), that henceforth permits for surface mining on the ceded strip will be in the form required by the State (p. 4), that the State agency shall be "the principal point of contact" for the mining operator (p. 5), and that the State agency shall be the "lead inspection authority" (p. 7).

[3] The court of appeals made the same mistake as respondents with respect to the regulation of current mining on the ceded strip and, as the Petition notes (Pet. 12), compounded its error by indicating that issues regarding current mining affect Subchapter IV's separate reclamation program for pre-1977 mining activities.

[4] Brief in Opp. at p. 18. The sentence reads: "Fifty percent of the revenues derived from a county, school district or lands of an Indian tribe are to be returned to that county, school district or Indian tribe." S. Rep. 95-128, 95th Cong., 1st Sess. 67 (1977).

no aid to respondents because the Conference Committee specifically rejected the Senate's approach, "which would have treated Indian tribes in much the same way as States are treated under the Act" with respect to off-reservation "Indian lands." H. R. Rep. No. 95-493, 95th Cong., 1st Sess. 98-99 (1977); S. Rep. No. 95-337, 95th Cong., 1st Sess. 98-99 (1977). In passing the statute in its present form, the Conferees stated their intention in the clearest possible terms. "The Conferees *intend* that 50 percent of the reclamation fee *must* be allocated to the state or *Indian reservation* in which the coal was mined . . ." (*ibid.*, emphasis added).[5] The Secretary violated this clear legislation mandate by adopting a regulation (30 C.F.R. § 872.11 (b)(3) that not only contradicts its statutory counterpart (30 U.S.C. § 1232(g)(2)), but also conflicts with Congress' direction in Subchapter IV that the Secretary must promulgate regulations "incorporating the provisions of this subchapter" (30 U.S.C. § 1235(b)).

3. There is little of substance in respondents' remaining points. They argue that Montana's challenge to the rulemaking was not sufficiently broad because it focused only on the subsection of the regulation allocating off-reservation funds to the Indian tribe rather than on the subsection allocating funds to the States. Brief in Opp. 10 to 12. There is nothing to the argument. Respondents never raised it in either of the courts below. When the Crow Tribe alone made the

---

[5] In any event, this sentence in the Senate Report, which respondents quote, does not make clear whether it is referring to off-reservation land. The Conference Reports cited in the text are, in contrast, careful to use the phrase "Indian reservation" in referring to the allocation formula.

contention for the first time on appeal, the appellate court gave it short shrift and for good reason. Pet. App. 12a-13a n. 9. If 30 C.F.R. § 872.11(b)(3) fails, as it should, all moneys collected from coal mining outside reservation boundaries will be allocated to the State, as Congress intended, and the "Indian lands" portion of the preceding subsection (30 C.F.R. § 872.11(b)(2)), will simply be inoperative. If respondents attempted to act otherwise by continuing to place funds collected on the "ceded strip" in a state of limbo and by refusing to distribute such funds to the State despite a judicial decision, Montana's complaint—which sought further ancillary relief if necessary—would be broad enough to authorize an injunction requiring respondents to conform to the Act and the court's decision. See Rule 54(c), Fed. Rules Civ. Pro.

4. Without citing any authority (there is none), respondents also assert that some interest in "finality" supports the regulation at issue. Respondents forget, however, that it was the Secretary who—in 1981—reopened the matter, announced that the subject was being reconsidered and invited public comment. See Pet. App. 8a-9a. It is from that point that finality must be measured. Montana and New Mexico accepted the Secretary's invitation and submitted comments. That the Secretary, after considering these comments, incorrectly rejected them and promulgated the regulation in its original form, places the regulation on no special footing in a timely action for judicial review, contrary to respondents' assertion.

What is of significance here is something respondents continue to ignore—namely, the reasons expressed by the Secretary for promulgating 30 C.F.R. § 872.11(b)(3), which are discussed in the Petition (at pp.

10-11). According to the Secretary, he deleted the statutory phrase "Indian reservation" because it was too clear; the Secretary then acknowledged that by substituting "Indian lands" in place of the statutory language, he had intentionally created a "definition problem," which has prevented ceded strip reclamation fees from being used for the purpose Congress intended—reclamation. While the grounds on which respondents seek to uphold the regulation are themselves untenable, they differ markedly from the Secretary's stated basis for the regulation, which is patently invalid and in direct conflict with *Escondido Mutual Water Co.* v. *LaJolla, Ricon, San Pasqual, Pauma and Pala Bands of Mission Lands,* 104 S. Ct. 2105 (1984). *Escondido,* as the Petition discusses, found identical statutory language—"Indian reservation"—clear and unambiguous and rejected attempts to create an ambiguity where none existed, which is what the Secretary has done here. See Montana's Petition at pp. 9-11.[6]

5. Finally, respondents tell the Court that Subchapter IV reclamation can be accomplished on the ceded

---

[6] Respondents suggest that the ceded strip might be considered part of the Crow Reservation because the Tribe holds mineral rights there. This suggestion, made for the first time in this Court, contradicts respondents' position in the courts below where they agreed that the ceded strip was not part of the reservation. See, *e.g.*, the Memorandum of Law In Support of Federal Defendants' Cross-Motion for Summary Judgment, at p. 12.

It contradicts as well the opinion of the court of appeals, which recognized that the ceded strip was not part of the Crow Reservation (Pet. App. 6a); the decisions of the Ninth Circuit cited in the Petition (at p. 6, n. 4); the constitution of the Crow Tribe (see p. 2 *supra*); and the recent decision of the Montana district court (App., *infra*, 3-A—18-A).

strip because the Secretary may use unallocated funds for this purpose. Brief in Opp. 20-21. In so stating, respondents contradict themselves. The Secretary's authority to spend unallocated funds stems from 30 U.S.C. § 1232(g)(3). Section 1232(g)(3) provides that such funds "may be expended in any State," yet respondents have attempted to support the regulation by arguing that the ceded strip is not "in the State" for purposes of Subchapter IV. Brief in Opp. 17.

CONCLUSION

Congress expressly directed that the concept of "Indian lands" cannot be applied to Subchapter IV, 30 U.S.C. § 1273(a). By directly contradicting this Section 1232(g)(2), which substitutes "Indian lands" for the statutory language "Indian reservation," respondents have paralized Subchapter IV's reclamation program as applied to the ceded strip. The decision below upholding this regulation conflicts with *Escondido* and with *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). See Pet. 11-12. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAY SMITH
Assistant Attorney General
STATE OF MONTANA
215 North Sanders
Justice Building
Helena, Montana 59620
(406) 444-2026

A. RAYMOND RANDOLPH
Counsel of Record
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

Counsel for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-78-110-BLG

THE CROW TRIBE OF INDIANS, *et al.*,
Plaintiffs,

-VS-

UNITED STATES OF AMERICA, *et al.*,
Plaintiff-Intervenor,

-VS-

STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana, CLARIBEL BONINE, Treasurer, Treasure County, Montana, *Defendants.*

WESTMORELAND RESOURCES, INC.,
Defendant-Intervenor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed September 10, 1985. Lou Aleksich, Jr., Clerk]

Plaintiff, the Crow Tribe of Indians, has filed this civil action challenging the validity of the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax insofar as these taxes are applied to coal produced on the Tribe's reservation and to coal produced on a ceded strip of land situated adjacent to the reservation. The Tribe seeks injunctive, declaratory, restitutionary, tax and money refunds, money damages, and other relief. Although this Court and the Court of Appeals considered the tax

with respect to mining on both locations on a motion to dismiss, the evidence at trial led this Court to conclude that there is no case or controversy with respect to coal mined on the reservation. *See infra* Conclusion of Law II. The following findings, therefore, focus on coal mined on the ceded strip.

This matter came on for trial before the Court, sitting without a jury, on January 9, 1984. The plaintiff was represented by counsel Robert S. Pelcyger and Dale T. White of Boulder, Colorado. Defendants were represented by counsel Jerome Anderson and John W. Ross of Billings, Montana, Assistant Attorney General Chris D. Tweeten of Helena, Montana, Treasure County Attorney James R. Carlson, Jr., of Hysham, Montana, Big Horn County Attorney James E. Seykora of Hardin, Montana, and Yellowstone County David W. Hoefer of Billings, Montana. defendant-intervenor Westmoreland Resources, Inc., was represented by Gerald B. Murphy of Billings, Montana, and Daniel H. Israel of Denver, Colorado. The plaintiff-intervenor United States was represented by Department of Justice attorney Stephen E. Carroll. From the testimony and evidence submitted by the parties and the briefs and arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Parties

1. The plaintiff, Crow Tribe of Indians, is an American Indian tribe, with the governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. The defendant State of Montana is a sovereign state of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676. Defendants Big Horn County, Yellow-

stone County, and Treasure County are political subdivisions of the State of Montana. Defendant Hamilton is Treasurer of Big Horn County; defendant Jenkins is Treasurer of Yellowstone County; defendant Bonine was Treasurer of Treasure County.

3. Defendant-Intervenor Westmoreland Resources, Inc., is a Delaware corporation having its principal place of business at Billings, Montana.

Ceded Strip—Creation and Description

4. The Crow Reservation was first set apart by the Treaty of Fort Laramie, 11 Stat. 749 (1851), and encompassed 38.5 million acres in what is now southern Montana and northern Wyoming. The second Treaty of Fort Laramie, entered into in 1868, 15 Stat. 649, reduced the Crow Reservation to 8 million acres situated entirely within what is now the State of Montana. The 1868 treaty set apart the reservation for the absolute and undisturbed use and occupation of the Crow Tribe. *Montana v. United States,* 450 U.S. 544, 547-48 (1981).

5. The 1868 treaty was followed by three major cessions of territory by the Crow Tribe: the Act of April 11, 1882, 22 Stat. 157, the Act of March 3, 1981, 29 Stat. 981, and the Act of April 27, 1904, 33 Stat. 352. The third, 1904, cession reduced the Crow Reservation to its present boundaries and created the "ceded strip," an area consisting of about 1,137,500 acres which lies to the north of the acknowledged reservation.

6. Large deposits of coal underly both the Crow Reservation proper and the ceded strip.

7. Most of the surface in the ceded strip is owned in fee by non-Indians.

8. The ceded area has a population of approximately 4600. Approximately 1% of the population is Indian.

9. The ceded area has been developed by non-Indians pursuant to state and county governmental law and regulation.

10. Land use within the ceded strip is primarily range land, irrigated cropland, hay land, pasture, forest cover, and non-irrigated cropland. Rural residential housing is located throughout the ceded strip.

11. The ceded strip includes one incorporated municipality, numerous unincorporated communities, a variety of special districts, and public school districts which are governed by state law.

12. The ceded area is not a legally constituted political subdivision of the State of Montana, but it lies within the boundaries of Big Horn, Treasure, and Yellowstone Counties. It does not conform to any political or administrative boundaries for which any economic or demographic data are normally collected. It receives full governmental representation in accordance with state law. This ceded area is located in the Thirteenth and Sixteenth Judicial Districts of the District Courts in the State of Montana.

Ownership of Coal Underlying the Ceded Strip

13. In 1904, the Crow Tribe ceded "all right, title, and interest" in the area presently referred to as the ceded strip. Act of April 27, 1904, 33 Stat. 352. The United States agreed to act as trustee for the Tribe, to dispose of the ceded lands under the various reclamation, homestead, and mineral laws, and to pay the Indians the proceeds of the sales. *See* 33 Stat. at 361. The Indians released their possessory right to the ceded strip lands but retained a beneficil interest in the undisposed-of ceded lands. *See Ash Sheep Co. v. United States,* 259 U.S. 159 (1920).

14. In accordance with the 1904 Cession Act, lands within the ceded strip were disposed of by the United States.

Under § 5 of the Act, the State of Montana received sections 16 and 36 for the support of common schools. 33 Stat. at 360. Some allotments to individual Indians were made under § 4. 33 Stat. at 358-59. The remaining lands in the ceded strip were opened to homestead entries. Under § 5, lands were offered for settlement for the price of $4 per acre. The lands that could not be sold for this price were to be offered for sale at a lesser price under such presidential proclamations as were deemed necessary. Further dispositions were made under a number of presidential proclamations. *See* May 24, 1906, 24 Stat. 3200; September 9, 1910, 36 Stat. 2742; August 9, 1912, 37 Stat. 1759; September 28, 1914, 38 Stat. 2029; and April 6, 1917, 40 Stat. 1653.

15. Under the 1904 Act and these various proclamations, a considerable amount of both surface land and mineral estate was conveyed to non-Indians. A few thousand acres of surface lands were never conveyed. The patents issued to non-Indians for approxiately 70,000 acres of coal lands expressly excluded rights to the underlying minerals in favor of the United States.

16. In 1934, Congress enacted the Indian Reorganization Act (IRA). 25 U.S.C. § 461 et seq. Under § 3 of the IRA, 25 U.S.C. § 463(a), the Secretary of the Interior was authorized to restore to tribal ownership "the remaining surplus lands of any Indian reservation opened before June 18, 1934 . . . ."

17. Three months after the IRA's enactment, in September 1934, the Secretary temporarily withdrew the surplus or open Indian lands that the United States had been authorized to sell as trustee or broker for Indian tribes. 54 I.D. 559 (1934). This Secretarial Order expressly withdrew the previously undisposed-of surface lands and minerals in the Crow ceded area. *Id.* at 561-63.

18. The Secretarial Order terminated, at least temporarily, leasing by the federal government of the previously

undisposed-of minerals within the ceded area pursuant to the mineral leasing laws governing public lands. In due course, the surplus or ceded lands, including previously undisposed-of mineral interests, of tribes that elected to accept the IRA were restored to tribal ownership. *See, e.g.*, 59 I.D. 393 (1947); 60 I.D. 174 (1948).

19. The Crow Tribe elected not to accept the provisions of the IRA. *See* 25 U.S.C. § 478. Consequently, these surplus or ceded lands were not restored to tribal ownership under 25 U.S.C. § 463.

20. The Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121, provided

> [t]hat all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership subject to valid existing rights: . . . Crow, Montana—10,260.95 [acres] . . . *Provided*, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.
>
> Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

21. The two major purposes of the 1958 Act, as revealed by its legislative history, were to treat non-IRA tribes in a similar manner as IRA tribes with respect to ceded or surplus lands and to restore to tribal ownership all the surface lands and mineral interests that were withdrawn from entry by the Secretarial Order (54 I.D. 559 (1934)). S.Rep. No. 1508 (85th Cong., 2d Sess. 1-2, 2-3 (1958); H.

Rep. No. 1336, 85th Cong., 2d Sess. 1-2 (1958)). Both committee reports state:

> This legislation, if enacted, will restore the lands [temporarily withdrawn by, *inter alia*, the September 1934 Order] to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.

Id. The reports expressly refer to the Secretarial Order which withdraw the previously undisposed-of ceded surface lands and mineral interests.

22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had been temporarily withdrawn in September 1934.

23. No significance can be attached to the use of the term "vacant and undisposed-of ceded lands" in the 1958 Act instead of the "surplus lands" language from § 3 of the IRA. See 25 U.S.C. § 463. The legislative history discloses why different language was used in these similar Acts.

24. S. 1757, the bill introduced by Senators Murray and Mansfield, and H.R. 3490 and H.R. 6160, predecessor bills introduced by Representative Metcalf, had used the phrase "surplus ceded lands of the class mentioned in the Indian Reorganization Act of June 18, 1934, Section 3 (48 Stat. 984; 25 U.S.C. § 463)" in § 1 of the bills to describe the

lands that would be restored to tribal ownership. In its comments on these bills, the Interior Department recommended that the lands be described instead "as vacant and undisposed of ceded lands" in order to "avoid the necessity for a cross reference" to the IRA. The Interior Department's report expressly stated that the recommended change "relate[d] to matters of form and do[es] not affect the substance of the bill." S.Rep. No. 1508, at 3; H.Rep. No. 1336, at 3.

25. The 1958 Act was intended to, and did in fact, fully restore the previously undisposed-of minerals in the Crow ceded strip to the full beneficial ownership of the Crow Tribe. The right and power of the United States to lease or sell those minerals was terminated. This Court expressly so held in *Redding* v. *Morton,* CV-74-12-BLG (D. Mont. 1974):

> In 1958, Congress restored to the Crow Tribe all of the undisposed of lands in the ceded area. 72 Stat. 121 (1958). The Interior Department has interpreted this series of enactments and case law to mean that the Crow Tribe owns all of the coal underlying the surface within the ceded area. Consequently, it must be concluded that the Crow Tribe was never divested of its title to coal which was not conveyed when the United States disposed of the surface land.

Id., Slip Op. at 8. The Court of Appeals did not reach the merits of the title question in the appeal of the *Redding* case. *Cady v. Morton,* 527 F.2d 786, 791, 798 (9th Cir. 1975).

26. The Act of August 14, 1958, 72 Stat. 575, amended the 1958 Act by authorizing the purchase by the federal government of the Tribe's right to some 4900 acres within the ceded area included within the Huntley Reclamation Project. The effect of the August 1958 Act was to reduce the surface lands restored under the May 1958 Act to ap-

proximately 5360 acres. S.Rep. No. 1508, at 4-5. A provision in the August 1958 Act evidences Congress' intent to restore minerals in the ceded strip to the Crow Tribe. § 1 of the August 1958 Act provides for the Tribe's retention of the minerals underlying these 4900 acres, and § 2 of that Act, 72 Stat. at 582, states "that the minerals reserved for the benefit of the Crow Tribe pursuant to Section 1 hereof shall be leased or otherwise disposed of under the laws and regulations relating to Indian trust lands."

27. The Department of the Interior has consistently treated the undisposed-of lands and minerals in the ceded area as being held in trust for the Crow Tribe. In a circular issued to explain the application of the Act of February 27, 1917, 39 Stat. 944, one of the Acts which permitted entry of the surface estate and reservation of the mineral estate, the General Land Office recognized that the Tribe retained a beneficial interest in the minerals after the surface estate was conveyed. Exhibits introduced at trial also showed that the Bureau of Indian Affairs has consistently treated the undisposed-of minerals as being held in trust for the Tribe.

28. There is a clear, consistent, and contemporaneous administrative construction by the Interior Department that the undisposed of minerals underlying the Crow ceded area were restored to full tribal ownership by the 1958 Act. *See* Exhibits 97, 87, D-435, 128.

29. Both the Crow Tribe and Westmoreland Resources have relied on this consistent administrative interpretation. This reliance is manifested by an investment of tens of millions of dollars in a coal mine.

Surface Coal Mining on the Ceded Strip

30. In June 1972, Westmoreland, a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying about 31,000 acres of the ceded strip. One of

these leases, encompassing over 16,000 acres, was cancelled in 1982 by mutual consent of Westmoreland, the Tribe, and the federal government. The second lease remains in effect and authorizes production of coal on Tract III which is located in Big Horn County on the ceded strip in sections 25, 26, and 36, Township 1 North, Range 37 East.

31. In 1974, Westmoreland's leases were amended to reflect a renegotiation and consequent increase in the Tribe's royalty rate. Agreement was also reached to renegotiate the royalty rate in ten years to a point at or about the prevailing market rate.

32. The coal leases and subsequent amendments were the result of arm's-length negotiations between Westmoreland, the Tribe, and the federal government. The leases and amendments were subject to federal approval and were approved by the Secretary of the Interior. The Tribe was free to accept or reject the terms of the agreements.

33. In Octobr 1972, Westmoreland began construction of its "Absaloka Mine" on Tract III. Mine facilities were built on the lease tract, and a 36-mile railroad spur line was built along Sarpy Creek to connect the minesite with the Burlington Northern line in Treasure County, Montana.

34. Surface coal mining operations at Westmoreland's Absaloka Mine commenced in Spring of 1974. Production reached 4 million tons in 1975 and has remained relatively constant, reaching a peak of 4.9 million ton in 1979 and declining since 1981. Under long-term sales contracts entered into in 1974, Westmoreland annually ships approximately 4 million tons of coal to four mid-west utilities. Such deliveries are to continue through 1993.

Surface Coal Mining on the Crow Indian Reservation

35. Although negotiations have taken place between the Crow Tribe and various mining companies, and some preliminary prospecting and exploration has been accom-

plished, no actual mining of coal by non-Indian lessees has occurred within the boundaries of the Crow Indian Reservation.

36. In April 1983, the Secretary of the Interior approved a 1980 coal mining agreement between the Crow Tribe and Shell Oil Company for a coal tract situated in the extreme southeastern corner of the Crow Reservation immediately north of the Wyoming border. Shell has not mined coal on the reservation nor does it have any current long-term contracts to sell reservation coal.

Governmental Services and Jurisdiction on the Ceded Strip

37. Since 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip. The state and its political subdivisions exercise exclusive jurisdiction on the ceded strip.

38. Public services provided by the state and local governments to the ceded strip include general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education.

39. The state makes available services to and exercises jurisdiction over the counties containing the ceded strip and the ceded strip itself in the same manner as it would for all other counties, or portions thereof, within the state. The state provided specific evidence that at least 11 public agencies of the state are involved in various governmental activities on the ceded strip. These state agencies include: the Department of Agriculture; Department of Commerce; Department of Fish, Wildlife, and Parks; Department of Highways; Department of Justice; Department of Health; Department of Labor; Department of State Lands; the Montana State Library; Department of Natural Resources

and Conservation; and the Department of Public Service Regulation. This list does not represent the entitety of state involvement in governmental activities on the ceded strip.

40. The total cost of these services cannot be precisely documented. The state's budgeting process is a complex, interrelated system, and it is not appropriate to look at one or a few components of that system in isolation. The budgetary process is not designed to identify all monies expended in response to a certain area or taxpayer or recipient. The budgetary process and accounting system is not designed to trace funds from a taxpayer to an expenditure.

41. Big Horn, Treasure, and Yellowstone Counties have historically provided and continue to provide, numerous and various services to the ceded strip. County and local governments have jurisdictional authority on the ceded strip.

42. Throughout the ceded strip, law enforcement is provided by the counties. In some cases law enforcement is provided by a consolidated city/county law enforcement agency. A courthouse building is located in the county seat of each County to provide administrative facilities for the function of general government in the ceded strip. The counties provide recreational facilities as well as health and welfare, library, emergency medical, and fire-fighting services. The ceded area is completely encompassed within the elementary and secondary school districts in the three counties. The extent and cost of these facilities and services are substantial as evidenced by both the value of physical assets and the budgets of the counties.

43. There are approximately 105 miles of Federal Interstate Highway, 45 miles of state primary and secondary highways, and 600 miles of paved and unpaved county roads located on the ceded strip. The county governments of Big Horn, Treasure, and Yellowstone have responsibility for paved and unpaved roads and bridges.

44. The county seat of Big Horn County is located in Hardin, Montana. The city of Hardin was specifically excluded from the Crow Indian Reservation in 1937. Act of August 31, 1937, 50 Stat. 884. Hardin provides numerous services to and is impacted by activities on the ceded strip as evidenced by its budgets. Big Horn County budgets on a county-wide basis for all necessary public services, including road construction, maintenance, and improvements, provisions for health and welfare services, fire, ambulance and police protection, and all normal incidental requirements of county services. Big Horn County operates a hospital and nursing home located in Hardin. Big Horn County has exclusively provided these services to the portion of the ceded strip in Big Horn County to the exclusion of the Crow Tribe and the Bureau of Indian Affairs. Examples of general governmental activities provided by Big Horn County within the ceded strip include functions of the County Commissioners' office, the County Assessor, the Clerk and Recorder, Treasurer, County Clerk, Justice of the Peace, County Attorney, and County Extension Office.

45. There are 202 miles of road responsibility located on the ceded strip in Big Horn County. The Big Horn County government is the only governmental agency which maintains and repairs state secondary highways within the county. Neither the Bureau of Indian Affairs nor the Crow Tribe contributes to the maintenance of state secondary highways on the ceded strip.

46. Big Horn County, to the exclusion of the Crow Tribe and the Bureau of Indian Affairs, has fought all fires on the ceded strip in Big Horn County.

47. Big Horn County provides substantial education facilities and services on the ceded strip. High School District No. 1 is located partly on the ceded strip.

48. Treasure County is the exclusive provider of police services, judicial services, and general governmental serv-

ices in that part of the ceded strip located in Treasure County, including district court, juvenile court, fire protection services, ambulance services, road and bridge construction and repair, a medical clinic, sanitary landfill services, all schools and related services, and through interlocal agreement with Rosebud County, services of the county to indigents.

49. The fire service and ambulance service are manned by volunteers who receive either no compensation or nominal compensation.

50. A large majority of the population in Treasure County resides on the ceded strip.

51. Treasure County's total budget has increased nearly fivefold since 1970 while tax revenue has only doubled. Treasure County has deleted or reduced services as a result, specifically deleting all library services, all mental health services, and delaying or postponing bridge repair, road maintenance, and construction. In recent years, Treasure County has levied the legal maximum rate for its general governmental levy, and since 1975 it has levied the legal maximum rate for the road and bridge funds.

52. Treasure County has approximately 11,000 acres of non-fee patent lands located on the ceded strip for which it receives no tax revenues or payments in lieu of taxes from the federal government, the Crow Tribe, or any other government. Treasure County provides all governmental services, including fire protection, law enforcement, and the other services for these lands.

53. Yellowstone County provides a full range of governmental services which are available to residents on that portion of the ceded strip within Yellowstone County. Yellowstone County maintains about 335 miles of roads in the ceded area. It also maintains seven parks located witin the ceded area in Yellowstone County.

54. The Crow Tribe provides little or no governmental services to the ceded strip, and it has not exercised and does not exercise general civil jurisdiction in the ceded area. Neither the Crow Tribe nor the Bureau of Indian Affairs provides fire protection, roads, police, or other governmental services on the ceded strip. None of the Crow Tribe's ordinances apply on the ceded area, and in its constitution the Tribe has disclaimed jurisdiction outside of the boundaries of its reservation.

Jurisdiction and Services Related to Coal Mining on the Ceded Strip

55. Coal mining has an extensive, pervasive effect, both direct and indirect, on state and local government. The state and county governments provide numerous facilities, assistance, and services, to coal mining, which enable coal development everywhere in the state to occur in an orderly manner. The costs of these facilities, assistance, and services are difficult to document and quantify in their entirety, but the total cost is substantial.

56. State government is affected both in specific service provisions and general governmental activities by coal development occurring anywhere in the state including areas affected by the Westmoreland mine. The state government incurs costs in responding specifically to coal mining activities, both on and off the ceded strip, and to incremental demands placed on the government by coal development. Organizations and people associated with coal development have access to and utilize the entire array of state governmental activities, including those provided by the judicial, legislative, and executive branches.

57. The state and its political subdivisions had responsibility for and incurred the costs of developing and maintaining the governmental and physical infrastructure that allowed development of coal on the ceded strip. Westmore-

land Resources has utilized and had the advantage of various services, facilities, or governmental structures that were in place when its mining activities commenced. These services, facilities, and governmental infrastructures were developed, maintained, and financed at substantial cost by the state and local governments.

58. It is not possible to identify and quantify the total extent of coal-related demands on or use of state services generally, or Westmoreland's demands on or use of state services. The state and the ceded strip counties have provided extensive services to and regulated the ceded strip and the Westmoreland mine. There are numerous examples demonstrating that such services are extensive and substantial. For example, the Montana Department of Commerce, which administers the Montana Coal Board grants, has made numerous grants to the area affected by Westmoreland's mining operation. The Montana Department of Health and Environmental Sciences inspects the Westmoreland Mine at least five times annually and has provided operational assistance for sewer lagoons in communities near the Westmoreland Mine. The Montana Department of Highways has constructed and maintained highways in the vicinity of the Westmoreland Mine. The Department of Justice has provided highway patrol and fire marshal activities in the vicinity of the Westmoreland Mine. The Montana Department of Labor and Industry has provided safety and health inspections at the Westmoreland Mine and provides the unemployment and workman's compensation programs for employees at the Westmoreland Mine.

59. Governmental services used by and available to the Westmoreland Mine are indistinguishable in form from those available to other mines operating in Big Horn County and elsewhere in Montana.

60. With regard to mining and reclamation at Westmoreland's Mine, Montana has historically taken the lead and continues to take the lead and do the bulk of the regu-

latory work. Westmoreland's Mine is regulated in the same manner as any other surface coal mine in Montana.

61. The Montana legislature has enacted numerous mining and reclamation requirements at the insistence of its citizens. Westmoreland's mining operation has been developed and conducted pursuant to Montana's mining and reclamation and environmental requirements.

62. Numerous state permits and approvals may be required in conjunction with coal mining. The State of Montana and its political subdivisions have issued a number of permits and approvals for the Westmoreland Mine.

63. The Montana Department of State Lands has issued numerous permits and prepared several environmental impact statements on the Westmoreland Mine. The Department also reviews and inspects the Westmoreland Mine on a regular basis, and it has issued a number of notices of violation to Westmoreland.

64. The Montana Department of State Lands, even after the passage of the Federal Surface Mining Control and Reclamation Act (SMCRA), still has the primary role with regard to regulation of mining and reclamation at Westmoreland's Mine.

65. The Crow Tribe does not have an approved mining and reclamation program which applies to the ceded area. SMCRA provides that before Indian tribes may become eligible to administer a mining and reclamation program, Congress will have to amend SMCRA, and Indian tribes will have to take various actions before the tribes can be eligible and can implement a mining and reclamation program. Neither Congress nor the Crow Tribe have taken these necessary actions.

66. The Crow Tribe does not have jurisdiction to provide services on the ceded strip. The Tribe has not provided and will not provide services to the Westmoreland Mine.

67. The roles of the federal government and the Crow Tribe with regard to coal development are limited to leasing and monitoring of production. The role of the BIA is limited primarily to receiving payments and determining how much coal is mined. The BIA responsibilities with regard to the Westmoreland Mine do not extend beyond those in the lease.

70. The only functions performed by the Crow Tribe or the BIA on the ceded strip relate to the Tribe's status as royalty owner and not to its status as sovereign. Because the Crow Tribe is not responsible for governmental services associated with coal development in the ceded strip, its interest in the ceded strip is limited to the interests of any other coal lessor.

Impacts of Surface Coal Mining on the Ceded Strip

71. In addition to responsibility for providing the infrastructure which enables coal development in the state, and more particularly on the ceded area, to occur, and for responding to ongoing administrative and service demands from Westmoreland's and others' mining activity in Montana, the state and its political subdivisions have jurisdiction over, and thus responsibility for, responding to deleterious socioeconomic, political, and governmental consequences of coal mining.

72. Impacts of coal mining are characterized by a boom and bust cycle.

73. The effects and impacts of coal mining and related activities are not limited to direct impacts of mining or mine-related activities themselves. Environmental and socioeconomic effects occur which are geographically disbursed and indirectly related to project activities but which nevertheless have the potential to require state and local governmental response.

74. An important function of state government is to assume responsibility for responding to unforeseen effects of activities such as coal mining. Despite all efforts to anticipate serious adverse effects, and despite permitting and bonding requirements, the risks of significant, costly, unforeseen effects still exist. It is the responsibility of the state to obtain compensation for assuming these risks on behalf of the state's citizens.

75. The impacts caused by coal mining and related activities, including impacts from the Westmoreland Mine, can only be partially identified and documented at this time. Significant problems of measurement and quantification prevent an accurate and complete estimation of many of those impacts. Many of the effects and costs associated with coal mining are currently unknown. For example, reclamation is not yet complete, and its degree of success is uncertain.

76. Some impacts and effects of coal mining can be currently identified, but it is difficult to quantify precisely and entirely the costs and impacts associated with a particular coal mine. The nature of the effects of coal mining do not allow such complete quantification, and governmental accounting systems are not designed to tract service provisions or utilizations by geographic area, taxpayer, or purpose.

77. The land ownership patterns, and the distribution of environmental and socioeconomic effects of coal mining, particularly at Westmoreland's mine on the ceded strip place the responsibility and burdens for response to these effects on state and local governments, in a manner similar to that of other coal mining activities in Montana.

78. Because few Crow Indians live on the ceded strip, the Tribe has a limited interest in insuring that the environment of the ceded strip and the public services available on the ceded strip are protected and maintained.

79. There is no evidence that the Crow Tribe provides any response to the impacts from mining on the ceded area.

80. Impacts from Westmoreland's mine are both socioeconomic and environmental. Some have occurred or will occur in the short term, and others will occur after a longer period of time. Some have occurred or will occur in the immediate vicinity of the mine, including the ceded strip, and others have occurred or will occur statewide.

81. Certain environment impacts can be measured, identified, and associated with the Westmoreland Mine at this time. For example, Westmoreland's mining activity has increased and will continue to increase the concentration of air borne particulates and other pollutants. There are surface and ground water effects or potential effects associated with Westmoreland's mine which may be substantial but which may not be known for a relatively long time. The Westmoreland Mine has short-term and perhaps long-term effects on soils, vegetation, and wildlife. Because reclamation at the Westmoreland Mine has only occurred over a relatively short time, it is too soon to determine what the effects of the Westmoreland Mine will be on vegetation. The effects on wildlife caused by the Westmoreland Mine depend significantly on long-term results of reclamation.

82. The Westmoreland Mine has caused impacts on state and county roads in the area requiring construction of certain roads and increased maintenance to others.

83. The socioeconomic effects of the Westmoreland Mine are also difficult to identify and document in their entirety at this time. The state of Montana and its political subdivisions, however, have incurred the major socioeconomic burdens associated with the Westmoreland Mine and assumed the risk for further adverse impacts. For example, most of the employees at the Westmoreland Mine live off the reservation, primarily in Hardin, Montana. The Westmoreland Mine has also indirect socioeconomic effects in

other areas of Montana, including Big Horn, Yellowstone, and Treasure Counties.

84. There have been substantial impacts upon residents of Big Horn and Treasure Counties as a result of the Westmoreland Mine arising from the construction of the railroad spur to that mine, increased rail traffic, and increased vehicle traffic. These impacts caused changes in the lifestyles of the local residents, and many have not been compensated by Westmoreland, the Tribe, or the United States.

85. There are timing and jurisdictional mismatches of revenues and demands resulting from the Westmoreland Mine. For example, Treasure County has experienced impacts from the Westmoreland Mine to its county roads, law enforcement, and other programs which have not been offset by property or gross proceeds taxes from the Westmoreland Mine.

86. The responsibilities to respond to effects of the Westmoreland Mine to date have fallen upon the state and county governments and not upon the Crow Reservation or Crow Tribe.

Leasing of Tribally-Owned Coal—The 1938 Act

87. The development of minerals held by the United States in trust for the Crow Tribe on the ceded strip, at least after 1968, has been subject to the provisions of the 1938 Indian Mineral Leasing Act (1938 Act), 25 U.S.C. § 396a-396g.

88. The leasing activity with regard to coal located in the ceded area, including the lease issued to Westmoreland for Tract III, has taken place under the 1938 Act and the regulations promulgated under that Act, 25 C.F.R. § 211.1-.30 (1983).

89. Crow coal can now also be developed pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101,

et seq. The only actual development of Crow-owned coal, however, has taken place under the authority of the 1938 Act.

90. Westmoreland's lease was issued under the 1938 Act.

The Need for Revenues on the Crow Reservation

91. Evidence presented at trial showed that there are enormous unmet needs on the Crow Indian Reservation for additional revenues to fund essential governmental programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. While some of the witnesses whose testimony concerned the needs of the Crow people sought amounts of funding that might be difficult to attain even in prosperous areas, all of the witnesses identified basic needs in their specialty areas that the Crow Tribe, even with federal and state assistance, is unable to provide due to insufficient revenues.

92. Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

Montana's Coal Taxes

93. In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. Mont. Code Ann. §§ 15-35-101 to 111 (1983) and §§ 15-23-701 to 704 (1983).

94. The Montana Coal Severance Tax, Mont Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the State." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the

value of the "contract sales price" of the coal which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production . . . ." Mont. Code Ann. § 15-35-102. The statutory rate of tax varies from 3 to 30% of the value of the coal, depending upon the heating quality of the coal and the method by which it is mined. Mont. Code Ann. § 15-35-103.

95. Montana's coal taxes are paid quarterly by the producers, Mont. Code Ann. § 15-35-104, who then pass them forward to their utility company customers according to the terms of their coal contracts.

96. Montana has made provision for the disposition of funds gained through the coal severance tax. Mont. Code Ann. § 15-35-108. The major recipient is a permanent trust fund which was approved as a constitutional amendment by referendum. Mont. Const. Art. IX § 5. The purpose of the constitutional trust fund is to address environmental and socioeconomic impacts which may arise in the future and which may be consequences of the cessation of large-scale coal mining in Montana. The trust fund contains only moneys collected pursuant to the coal severance tax. The principle of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The Legislature may, however, appropriate the interest income earned by the fund. Approximately 25% of the coal severance tax moneys collected between July 1, 1977, and December 31, 1979, were allocated to the trust fund; 50% of the collections after that date go into the fund.

97. The remaining severance tax moneys are allocated to a variety of uses. The two largest uses are a "local impact and education trust fund account," which has received between 18 and 28% of the severance tax revenues, and the state's general fund, which has received between 19 and 40% of severance tax revenues. The remaining revenues have gone to state equalization aid to public schools,

a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land use planning, and a sinking fund servicing renewable resources development bond accounts. Mont. Code Ann. § 15-35-108.

98. The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-35-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, among other things, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont. Code Ann. § 15-23-702. The county assessor then enters the value on the assessment role, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

99. The gross proceeds tax enacted in 1975 is substantially a reenactment of the net proceeds tax on coal at substantially the same effective rate. The net proceeds tax was first enacted in 1981. The tax generates revenue for the counties, school districts, and other local taxing entities. The rate of the gross proceeds tax is set by the local taxing entities' mill rate which is dependent upon revenue needed to operate.

100. All of the benefits of governmental services resulting from Montana's coal taxes are available to all citizens, including members of the Crow Tribe.

101. Montana's coal tax allocation structure has made it possible to make grants to communities located within

the boundaries of the Crow Reservation, as evidenced by a number of Coal Board grants to the communities of Lodge Grass and Wyola, provisions in the Montana coal tax law specifically identify Indian tribes as being eligible for coal board grants.

102. Impact moneys are available from the state to aid in mitigating impacts occurring on the reservation from coal mining on the ceded strip.

History of the Coal Tax and its Legislative Justification

103. Montana's coal taxes were influenced by Montana's history of boom and bust in the mineral industry, the apparent coal boom in Montana in the early 1970's, and Montanans' desire and the Montana constitutional obligation that resource development within Montana occur without harm to the residents and environment of the state.

104. Coal tax bills were introduced in the 1973 Montana Legislature. None passed, and the legislature established an interim legislative fossil fuel study committee. The interin study committee conducted extensive studies, held public hearings, conducted extensive investigation regarding coal sales and coal taxes, and considered the short and long term impacts of coal mining. The committee reported its findings and proposed severance and gross proceeds tax legislation. After extensive debate, the legislature overwhelmingly enacted Montana's current coal taxes.

105. As stated in the April 16, 1975, "Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation:"

> In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase the revenue going to the general fund, (b) to respond to current social impacts attributable to coal development, and

(c) to invest in the future, when new technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low grade lignite and 30% on other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

Id. at 1.

106. The Montana Legislature was aware of the potential impacts and costs of mining when debating Montana's coal severance and gross proceeds taxes. The legislature believed that other environmental laws would not prevent or remedy all impacts and costs of coal mining and that a tax on coal operators was therefore necessary. Legislators supporting the coal severance and gross proceeds taxes were determined to have coal development pay its own way.

107. Because demands for services can occur both before mining operations begin and after they cease, the legislature took the position that reasonable and prudent response to large scale coal development required the establishment of a taxing and administrative structure that (1) collected adequate resources to cover current and future costs, (2) compensated the state and local jurisdictions for assuming the risk associated with these responsibilities, and (3) is flexible enough to address the issues of jurisdictional and temporal mismatch and cumulative effects. State taxing policy required that any tax levied also have uniform application, be efficient to collect, and provide a stable revenue flow.

108. The structure of Montana's coal severance tax and the distribution of coal severance tax revenues reflects the intent of the legislature to meet the needs of Montana with respect to coal mining. The structure of the tax was designed to:

(a) Allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stablize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections;

(d) accomplish the foregoing purposes by establishing categories of taxation which would recognize the unique character of coal.

Mont Code. Ann. § 15-35-101(2) (1983). The severance tax rates imposed were derived by the coal tax oversight committee based on its best estimate of the short and long-term costs to the state from coal mining.

109. Montana's coal taxes were not designed to prohibit coal development, but were designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share. A proposed moratorium on coal development in the 1974 Montana Legislature was defeated.

110. Montana's coal taxes were not designed to capture maximum economic rents or excess profits. The Montana Legislature recognized that coal development would place a variety of demands on state and local government and would benefit from the trained work force and organized society that resulted from state and local government activities. The legislature also recognized that large scale coal development imposed a risk of environmental impact on state and local governments, on surface owners, and on all residents of the state.

111. Montana's coal severance tax was designed to address some of the major problems associated with coal development. Tax revenues were intended to provide front end financing to communities and agencies faced with rapid increases in demands for various services. Severance tax

revenues are and will continue to be used to remedy problems created by jurisdictional mismatches. Severance tax revenues are also set aside for the future and will be used to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.

112. The Montana Legislature and the interim coal committee have the Montana severance and gross proceeds taxes under continuous review, and all citizens and coal companies are given periodic opportunities to express their views on the appropriateness of the Montana coal taxes.

The Crow Tribe's Coal Severance Tax

113. On January 31, 1976, the Crow Tribe enacted its own coal severance tax code to tax coal mined on the reservation at a statutory rate of 25%.

114. In July 1982, the Tribe enacted a new code providing for taxation on the ceded strip. The 1982 severance tax code has not been approved by the Secretary of the Interior for enforcement on the ceded strip. The Secretary has withheld approval because the Tribe lacks the power under its constitution to levy a tax off its reservation and because the Secretary has not determined whether such power exists as a matter of federal law.

115. Any tribal tax revenue is subject to future allocation. The Tribe's tax is a general revenue tax, and the Tribe makes no claim that it would be used to offset reservation or ceded strip impacts resulting from coal mining. The Tribe has no statutory provision to allocate coal development funds to mitigate impacts or provide coal mining-related services on the ceded strip.

116. Presently, about 60% of the revenue obtained by the Crow Tribe from coal development goes to per capita distribution to tribal members.

117. Because there has been no actual mining of coal by lessees on the reservation, no revenues have been col-

lected under the Tribe's severance tax code. The Tribe's severance tax is not applicable presently to coal produced at Westmoreland's Absaloka Mine on the ceded strip.

118. In September 1982, Westmoreland and the Crow Tribe entered into an agreement under which Westmoreland agreed to pay to the Tribe "a tax" equivalent in amount to Montana's taxes, and the Tribe agreed to give Westmoreland credit for any severance and gross proceeds taxes that Westmoreland is required to pay to the State of Montana or its political subdivisions.

119. The arrangement under which Westmoreland agreed to pay the Tribe this "tax" was proposed by the Tribe's counsel and appears to have been motivated largely by the Tribe's desire to improve its position in this litigation.

120. The payments under this arrangement were denominated a tax to allow the producers to pass them forward to their utility customers under their coal contracts.

Application of Coal Taxes to the Westmoreland Mine.

121. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975 pursuant to Mont. Code Ann. §§ 15-35-102 and 103. At year end 1982, Westmoreland had paid approximately $58,800,000 in severance taxes and approximately $8,100,000 in gross proceeds taxes.

122. Westmoreland has not paid any coal taxes to the Crow Tribe.

Effect of Montana's Coal Taxes on the Tribe's Royalty Interest on Ceded Strip Coal

123. There is no convincing evidence that the state's taxes affect the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland.

124. The Tribe's first lease agreement with Westmoreland provided for a royalty of 17¼¢ per ton plus other benefits. Further negotiations in 1974 led to a lease amendment increasing the royalty payment to the Tribe to 35¢ per ton, or 6% f.o.b. mine price, whichever is greater. The 1974 agreement between the Tribe and Westmoreland also increases the royalty on future contracts to 40¢ or 8%, whichever is greater.

125. Under the 1974 agreement between the Tribe and Westmoreland, Westmoreland has agreed to renegotiate its royalty payments to the Tribe every ten years. The agreement provides that the renegotiated royalties will be set at or near the prevailing market rate.

126. The royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner.

127. While the royalty percentage of the Tribe has increased since 1975, the percentage rate of the Montana severance tax has stayed the same, and there have in fact been adjustments to Montana's tax which reduce the effective rate of the tax, which, in turn, will reduce the disparity of total income received by the Tribe and the State of Montana.

128. The Tribe received approximately $17,877,126 in royalties from Westmoreland through October 1983. In addition to royalties, the Tribe has received other benefits from Westmoreland. For example, the Crow Tribe has an employment preference provision in its agreement with Westmoreland which results in additional money and benefits to the Tribe.

Effect of Montana's Coal Taxes on the Marketability of Ceded Strip Coal

129. There is no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal. There was also no testimony that any past or present negotiations to market Crow coal have focused on the gross proceeds tax as a marketing factor.

130. There are numerous factors which affect the marketability of Montana coal, and more specifically, the Tribe's marketing of its ceded strip coal. Although the cumulative effect of coal taxes is one of these factors, the evidence at trial showed that the tax rate, at least at present, is overshadowed by other factors.

131. During a period from 1965 to 1983, the uncertainties created by the Crow Tribe's failure to adhere to agreements or establish clear policies, procedures, and directives, regarding development of their ~~coal~~ became significant factors in the development or lack of development of tribally-owned coal.

132. In the early to mid-1970's, with the adoption of clean air legislation, projections of increased electrical demand, and the Arab oil embargo, there was a boom in the demand for western coal. The coal market since the mid-1970's has softened, and there is now little or no demand for additional coal. Many coal companies in several states presently have excess production capacity and have found it increasingly difficult to market coal.

133. The characteristics of coal from a particular mine are important to a utility when a decision is being made to purchase coal. The ash, chemical characteristics, and physical properties, such as moisture, BTU value, and contamination, are important considerations for existing coal-burning plants. The plants' characteristics also affect a utility's decision to purchase. For new coal-burning plants, these

factors, along with delivered cost, possibility of future cost increases, environmental considerations, reliability of source, production capacity, reserves, and alternative sources influence the utilities' purchasing decisions.

134. Transportation costs are a major factor in the marketability of coal. It is generally acknowledged that the "delivered price" of coal is the critical economic factor in any purchaser's decision. A major component of the delivered price is the rail or transportation costs. Montana's coal taxes are a relatively small percentage of delivered price. Transportation costs and distances are the major factor in determining the logical marketing area for a mine's coal production. The railroads are in a position to significantly influence the marketing of a particular coal.

135. Montana's logical coal marketing area, which includes the upper midwest and the Pacific northwest, has experience less demand for coal since 1975 than Wyoming's logical market for coal, which is the south and southwest. Demand for coal in Montana's primary market in the midwest has been relatively soft because the demand for electricity and additional coal by utilities in the midwest has declined since the mid-1970's compared to the demand for electricity and additional coal in the south and southwest.

136. While the delivered price of coal is a critical economic factor in a purchaser's coal-sourcing decision, there are other non-economic factors which sometimes require a utility to purchase a higher-priced coal. For example, there are utilities in the midwest which have purchased coal from Wyoming which will have significantly higher delivered price than purchase of Montana coal because these utilities require the better quality of Wyoming coal for environmental reasons.

137. There is no evidence that Westmoreland has lost or will lose any particular coal contract because of Montana's coal taxes. In spite of the relatively low BTU qual-

ity of Westmoreland's coal and the high moisture content generally present in Montana coal, a Westmoreland representative expressed guarded optimism that Westmoreland could effectively compete for contracts to supply coal to three plants scheduled to be on line in the next few years. Westmoreland has a significant transportation advantage with respect to these three plants.

138. The continued competitiveness of Montana coal is also demonstrated by the fact that there have been new mines opened in Montana since the severance tax was enacted in 1975, and there have been new applications filed with the Montana Department of State Lands by other coal companies expressing a desire to open new mines in Montana. Further, Montana companies have had new contract sales since the adoption of Montana's coal taxes in 1975.

139. Based on the 1982 agreement between the Crow Tribe and Westmoreland, if the Crow Tribe prevails in this lawsuit the Tribe would receive a payment equal to the amount Westmoreland is presently required to pay to the State of Montana. Based on this agreement, there would be no change in the effect, if any, of the taxes on the marketability of ceded strip coal. The Court does recognize, however, that the Crow Tribe-Westmoreland agreement may be changed by further negotiation.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 1391(b).

II.

It is inappropriate at this time to declare the rights of the parties respecting the validity of Montana's coal taxes assessed on coal produced within the external boundaries

of the Crow Indian Reservation. Although the matter was considered on a motion to dismiss by both this Court and the United States Court of Appeals for the Ninth Circuit, the evidence adduced at trial indicates that there is no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil,* 312 U.S. 270, 273 (1941). The decision to issue declaratory relief rests in the sound discretion of the trial court. *See Provident Trademen's Bank & Trust v. Patterson,* 390 U.S. 102, 126 (1968). The Court is reluctant to declare whether or not the state's coal tax statutes are valid on the reservation because: (a) no severance or gross proceeds tax has been assessed or collected on the Crow Indian Reservation; (b) there is no surface coal mine on the reservation which produces coal arguably subject to the state's coal taxes; (c) although coal mining agreements have been reached between the Tribe and non-Indian lessees, the lessees have not entered into long-term coal contracts, and, because of a slumping coal market, the mines contemplated by the agreements may not come to fruition; (d) the record lacks detail with respect to surface coal mining on the reservation; and (e) the State should have an opportunity to reassess its position with regard to taxation of on-reservation coal after final resolution of the validity of the state's taxes on tribally-owned coal on the ceded strip.

III.

Title to undisposed-of minerals underlying the ceded strip is held in trust by the United States for the Crow Indian Tribe.

(a) The second treaty of Fort Laramie, 1868, which set apart the 8 million acre Crow Reservation for undisturbed use and occupation of the Crow Tribe vested all beneficial property interests in the Tribe, including the rights to the

underlying minerals. *United Sates v. Shoshone Tribe,* 303 U.S. 111, 117-118 (1938).

(b) Under the 1904 Cession Act, the Tribe gave up all right, title and interest to the ceded strip, but until the lands covered by the Act were actually disposed of, the Crow Tribe retained a beneficial interest in them. The United States acted as trustee for the Tribe with respect to disposal of lands and payment of sale proceeds. *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920); Act of April 27, 1904, 33 Stat. 352.

(c) When lands were disposed of under some of the homestead laws, *e.g.,* Act of February 27, 1917, 39 Stat. 944, only the surface estates were granted. The mineral estates were reserved to the United States, and the Tribe retained the beneficial interest in the minerals that were reserved. *See Ash Sheep Co. v. United States, supra.*

(d) The 1958 Act restoring undisposed of lands to the Crow Tribe expressly states that "all lands now or hereafter classified as vacant and undisposed-of ceded lands . . . are hereby restored to tribal ownership." The vacant and undisposed of minerals underlying the ceded strip fall within this description and are embraced by this provision of the 1958 Act. Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

(e) In spite of the language designating approximate surface acreage to be restored on named reservations, the 1958 Act restored the minerals in the ceded strip to Crow tribal ownership. Act of May 19, 1985, 72 Stat. 121; *Cf.* Solicitor's Opinion M-34836, 59 I.D. 393 (1947); Solicitor's Opinion A-25219, 60 I.D. 174 (1948). The approximate acreage figure of 10,260.95 acres listed for the Crow Reservation creates an ambiguity on the face of the statute which can only be resolved by resort to legislative history. *See DeCoteau v. District Court,* 420 U.S. 425, 447 (1975). The legislative history supports the conclusion that the 1958

Act restored the ceded strip minerals to the Crow Tribe. The two major related purposes of the 1958 Act, as revealed by its legislative history, were to accord equal treatment to the tribes that did not accept the IRA and to restore to tribal ownership all of the surface lands and minerals interests that had been temporarily withdrawn following the enactment of the IRA. *See supra* Findings of Fact 21-22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had temporarily withdrawn in 1934.

(f) Courts must interpret statutes in a manner that will promote, not defeat, the purposes that Congress sought to achieve. *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607-08 (1979). Applying that principle of statutory construction to the 1958 Act inescapably leads to the conclusion that the "vacant and undisposed-of ceded lands" restored to the full beneficial ownership of the Crow Tribe include the previously undisposed-of mineral interests in the ceded strip in which the Tribe retained a beneficial interest.

(g) The undisposed-of ceded minerals underlying entered land were not added to and made a part of the Crow Reservation by the 1958 Act. The term "reservation status" has little significance in describing a tribally-owned mineral estate which lies outside the surface boundaries of a tribe's reservation. The 1958 Act's legislative history provides no support for the anomalous proposition that Congress extended governmental powers and attributes of a

tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominently by non-Indians.

IV.

There exists no express authorization for the imposition of Montana's coal severance and gross proceeds taxes on the mining of coal held by the United States in trust for the Crow Tribe. The Supreme Court recently held that state authorization under the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, to tax mineral production does not extend to leases issued pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. *Montana v. Blackfeet Tribe of Indians,* 105 S.Ct. 2399 (1985).

V.

The Court of Appeals recognized that mining of coal on the ceded strip created a "further complexity" in analyzing the validity of Montana's coal taxes. *Crow Tribe of Indians v. State of Montana,* 650 F.2d at 1114. Because this case was before the Circuit on a motion to dismiss, the factual record was insufficient to allow the court to analyze fully the distinctions between state taxation on the ceded strip and state taxation on the reservation. This Court notes that the predominant focus of the Ninth Circuit's opinion is on the larger question of state taxation on the reservation. Insofar as this Court's conclusions depart from the Ninth Circuit's opinion, the Court believes them to be justified by the full factual record and by the jurisdictional vagaries applicable to the ceded strip which were elucidated at trial.

VI.

Montana's coal taxes imposed on the production by a non-Indian mining company of coal held by the United

States in trust for the Crow Indian Tribe outside the boundaries of the Crow Reservation are not preempted by federal law.

(a) An exercise of state jurisdiction is preempted when it directly conflicts with a federal enactment, *see, e.g., Kennerly v. District Court,* 400 U.S. 423 (1971), or when federal law or policy so pervasively governs the targeted activity that there remains no room for the additional burdens sought to be imposed by the state. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965).

(b) Montana's coal taxes do not directly conflict with a congressional enactment because none exists which expressly bars the State of Montana from imposing its coal taxes on coal held by the United States in trust for the Crow Tribe. The Court finds this especially significant with respect to coal mined on the ceded strip. In *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Supreme Court, noting that it does not lightly imply tax exemptions, stated that tribal activities conducted outside the reservation present "different considerations" and that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49. The state urges that any fair reading of *Jones* leads to the conclusion that state coal taxes levied on the ceded strip are not preempted since Congress has not explicitly done so. While the Court agrees that the state's argument has force, it declines the opportunity to buttress its conclusion solely on *Jones.* Further analysis of federal policy underlying the 1938 Mineral Leasing Act, analysis which the Court of Appeals held to be applicable and which appropriately takes into account the tradition of Indian sovereignty, also leads to the conclusion that the Montana coal taxes are not preempted on the ceded strip.

(c) There exists no pervasive federal law or policy governing the leasing of tribally-owned coal that ousts a state tax on production of tribally-owned coal on the ceded strip.

(d) In determining whether a state law is preempted by pervasive federal law or policy, a court must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980). The standards of preemption applied in Indian law differ from those that have emerged in other areas of law. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Id.* at 143.

(e) The fact that the tribally-owned ceded strip coal lies outside the boundary of the diminished reservation is an important consideration in the preemption analysis. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 151.

(f) The Court of Appeals found that the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396f, and the regulations promulgated under that Act, constituted the potential preemptive federal law in this case. The Ninth Circuit identified and directed this Court's preemption inquiry to three goals that Congress sought to achieve in enacting the 1938 Act:

> First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands . . . . Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25

> U.S.C. §§ 461-479 (1976), that tribal governments be revitalized . . . . Third, the 1938 Act was intended to encourage tribal economic development. . . .

Crow Tribe of Indians v. State of Montana, 650 F.2d at 1112-13; *see Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. at 2404 n. 5. The Tribe's arguments and evidence attempt to prove that the latter two goals are frustrated by the imposition of Montana's coal tax.

(g) State taxation of Crow coal on the ceded strip does not hinder the revitalization of Crow tribal government. The Court of Appeals determined that in the mineral leasing context, revitalization entailed increasing of tribal government's control over decisions to lease tribal lands and over conditions to be placed on leases. Evidence at trial did not show that the Montana taxes either deprived the Tribe of control in leasing its ceded strip coal or significantly affect the rate of development of coal mining on the ceded strip. Any deterrent in the marketing of tribally-owned ceded strip coal caused by the severance and gross proceeds taxes is overshadowed by the present marketing difficulties common to all Montana coal due to a decreased market for coal in markets traditionally served by Montana coal. Coal owned by the Crow Tribe has been further disadvantaged in the marketplace by the Tribe's inability to put a marketing program in place.

(h) Discouragement, if any, of tribal economic development caused by state taxation of tribally-owned coal on the ceded strip can be justified by the state's legitimate interests in raising revenue to offset the cost of services it provides on the ceded strip, to mitigate short and long-term impacts of mining, and to perpetuate the mineral wealth subject to its general civil jurisdiction. Contrary to the Tribe's assertion, the Ninth Circuit's opinion remanding this case does not require, at least with respect to ceded strip coal, that the state establish a mathematical equilib-

rium between the quantifiable costs of coal development and the revenue raised by its taxes to avoid a finding that the state's taxes are preempted by federal law. Instead, the Ninth Circuit recognized that a state's legitimate interests also include such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of future socio-economic and environmental impacts resulting from coal mining. *Crow Tribe,* 650 F.2d at 1114. The ceded strip lies within the general civil jurisdiction of the State of Montana and outside the civil jurisdiction of the Crow Tribe. The state legislature has articulated legitimate and exceedingly strong regulatory interests and responsibilities and has imposed its coal taxes accordingly. *Cf. White Mountain Apache Tribe,* 448 U.S. at 150. *Ramah Navaho School Board v. Bureau of Revenue,* 458 U.S. 832, 845 (1982). The state's coal taxes do not impair the Crow Tribe's ability to obtain reasonable royalty rates when tribally-owned coal is leased.

(i) Montana's coal taxes are not in conflict with tribal taxation in the ceded area. The Tribe's tax ordinances have not been approved by the Secretary of the Interior for application to off-reservation mining because the Tribe lacks power under its own constitution to tax outside the reservation boundaries. The Court notes that in 1983 the Secretary withheld approval for the Hopi severance tax in part on the ground that due process does not permit a tribe to tax an activity with which it has no governmental nexus. *See* Exhibit D-417. A challenge that the Hopi Tribe was not empowered by its constitution to impose an off-reservation severance tax on its coal was raised but not addressed in the opinion.

VII.

Montana's severance and gross proceeds taxes levied on the production of tribally-owned coal on the ceded strip do

not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

(a) This "self-government test" is related to the pre-emption analysis insofar as federal law and policy encourage tribal self-sufficiency and economic development, but the right of tribal self-government serves as an independent barrier to the intrusive assertion of state regulatory authority over tribal reservations and members. *White Mountain Apache Tribe*, 448 U.S. at 142-43.

(b) In *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), the Supreme Court described the important considerations when the self-government test is applied to resolve a conflict between a state and an Indian tribe.

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated *on the reservation* by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is *directed at off-reservation value* and when the taxpayer is the recipient of state services.

Id. at 156-57 (citation omitted, emphasis added).

(c) *Washington v. Confederated Tribes of Colville* illustrates that the reservation boundary is a significant factor in balancing the interests of the state against those of the

federal government and tribe. The self-government analysis has little applicability to cases such as this where the state seeks to tax a non-Indian company for activities engaged in outside the reservation because, while tribes do retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 547 (1975), a tribe's governmental powers which arise from its retained sovereignty do not extend beyond the reservation boundaries. In 1904 the Crow Tribe relinquished its inherent authority to regulate or tax on the ceded strip and there has been no showing here that such power has been expressly returned to the Tribe by the United States. The relationship between Westmoreland Resources, Inc., and the Crow Tribe is purely contractual. Outside the reservation boundaries, on the ceded strip, this relationship carries with it no consent by Westmoreland to submit to the retained civil jurisdiction of the Crow Tribe. *Cf. Montana v. United States*, 450 U. S. 544, 565-66 (1981). Thus, on the ceded strip, the Tribe's interest in raising revenues is weak because the Tribe lacks governmental power and other sovereign interests which require accommodation with state interests under the self-government analysis.

(d) In any event, the self-government analysis leads to the conclusion that the state's taxes on the production of tribally-owned coal on the ceded strip are valid. A mere interest in raising revenues, even though the Tribe is in dire need of revenues to provide needed services on the reservation and to strengthen its economic base, does not in and of itself invalidate the state tax. There must be some contact between the Tribe's governmental power and the activities sought to be taxed. The Crow Tribe lacks such a connection with the off-reservation mining of its coal. The Tribe does not provide services on the ceded strip nor is it responsible for the impacts traceable to coal mining on the ceded strip. The evidence shows that the impacts of mining and the responsibilities for provision of services predominantly fall off the reservation and onto the state and local

governments. With respect to ceded strip coal, the Tribe is not seeking increased revenues from a value which is generated on the reservation. The Tribe's interest in its off-reservation coal is an ownership interest which is not substantially different than the interest held by any other coal lessor. The evidence shows that this ownership interest, the royalty interest, has not been impaired by the imposition of the state's coal taxes.

VIII.

The Court concludes that the Tribe and its lessees cannot create a tax on coal produced on the ceded strip by agreement. The 1982 lease agreement between the Tribe and Westmoreland contains a clause under which Westmoreland agreed to pay the Tribe a "tax" equal to the amount due under Montana's severance and gross proceeds tax laws with a credit for amounts actually paid to the state and local governments. Payment under this arrangement, which is collectible only because payor has consented, is simply not a tax. *See In re Lorber Industries,* 675 F.2d 1062, 1066 (9th Cir. 1982).

IX.

Montana's taxes have not been shown to constitute an impermissible "multiple burden" on interstate commerce. In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), the Supreme Court noted that an impermissible burden on interstate commerce could arise if both the state and tribe taxed the same mining activity or if one or both taxed the activity at a greater rate than their contact with the activity would justify. *Id.* at 158 n. 26. The Crow Tribe is not authorized to tax the production of coal on the ceded strip. Thus, the ceded strip is within the state's and not the Tribe's taxing jurisdiction. Therefore, the Court need not reach this interstate commerce issue with respect to the ceded strip as there can be no multiple tax burden.

X.

The Tribe has also raised a claim that Montana's coal taxes on tribally-owned coal are invalid under the Indian Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3. The Tribe claims that the taxes are invalid because they are not authorized by Congress or, at the least, they constitute an undue burden on Indian commerce. As the Tribe recognizes, however, the Supreme Court has found it unnecessary to modify the preemption analysis "to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation . . . ." *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 845 (1982). Therefore, the dormant Indian commerce clause cannot be used by the courts as an analytical avenue to the merits of cases such a that before this Court in addition to, or in lieu of, the preemption analysis absent a change in position by the Supreme Court.

XI.

This Court's finding that there is presently no approved tribal tax on the ceded strip negates the Tribe's contention that Montana must provide a credit against its taxes in the amount of analogous tribal taxes. The Court, therefore, need not entertain the merits of that claim.

XII.

Montana's coal taxes are not impermissible taxes on tribal trust property. The Tribe argues that because the taxes are in essence taxes on real property, the taxes must be viewed as being imposed ratably on both the producer's share and the royalty share. Consequently, the Tribe contends that the state cannot impose that portion of the tax attributable to the Tribe's royalty share. The Court concludes that Montana's taxes are not taxes on tribal trust property. Both the Montana Supreme Court and the Court

of Appeals have held that the legal incidence of the coal taxes falls on the producer. *See Commonwealth Edison v. Montana,* —— Mont. ——, 615 P.2d 847, 850 (1980), *affirmed* 453 U.S. 609 (1981); *Crow Tribe,* 650 F.2d at 1110. The Court of Appeals has noted, however, that it did not specifically address the question of where the tax incidence on the Tribe's royalty interest lies. *See Crow Tribe,* 665 F.2d at 1390 (1982). The severance tax statute clearly requires the "coal mine operator" to file the tax return and pay the severance tax. Mont. Code Ann. § 15-35-104 (1983). There is no requirement that the mine operator pass the tax back to the royalty owner. Similarly, the producer must pay the gross proceeds tax and there is no requirement that the tax be assessed against the royalty interest. *See* Mont. Code Ann. §§ 15-23-701 to 704 (1983). The producer, not the holder of the royalty interest, is subject to the imposition of liens upon the coal mine and the producer's personal property should the taxes not be paid. *See* Mont. Code Ann. § 15-23-704 (1983). The evidence at trial shows that coal mine operators pass Montana's coal taxes forward to the consumer. Thus, Montana's coal taxes are not levied on tribal property. The royalty interest is merely a component of the f.o.b. price on which the taxes directed at the producer are calculated.

XIII.

For the foregoing reasons, the Court concludes that the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax are valid insofar as they are applied to the production of coal held by the United States in trust for the Crow Tribe on the ceded strip.

An appropriate order shall issue in accordance with these Findings of Fact and Conclusions of Law.

Done and dated this 10th day of September, 1985.

/s/ James F. Battin
Chief Judge